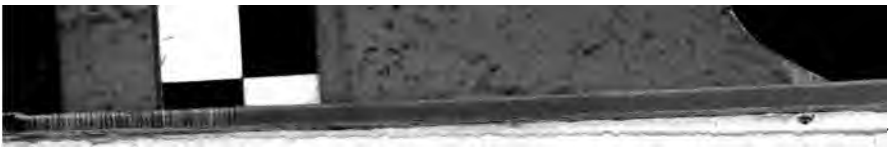

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Levi Lincoln

A

COMPENDIUM

AND

DIGEST

OF THE

Laws of Massachusetts.

BY WILLIAM CHARLES WHITE,

COUNSELLOR AT LAW.

" Misera servitus est, ubi jus est vagum, aut incognitum."

VOL. I.

BOSTON,

PUBLISHED BY MUNROE, FRANCIS AND PARKER,

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Feb. 1809.

I

To the Honourable

THEOPHILUS PARSONS, (Ch. J.)
THEODORE SEDGWICK,
SAMUEL SEWALL,
GEORGE THATCHER,
ISAAC PARKER,

Justices of the Supreme Judicial Court

of the

Commonwealth of Massachusetts,

THE FOLLOWING EFFORT

to facilitate

THE STUDY AND PRACTICE OF OUR JURISPRUDENCE,

is,

with respectful diffidence,

INSCRIBED.

ADVERTISEMENT.

THE quotations from Espinasse are from the Philadelphia edition, 1791; and those from Blackstone are from the Portland edition, 1807. The statutes are quoted after the manner adopted in the two first volumes of the Massachusetts Reports; with this difference however, that the Reports give only the date of the statute, whereas the number of the statute (computed from the first statute of the same date) is also given in this work. This addition of the number of the statute was deemed expedient by reason of the frequent occurrence of many statutes bearing precisely the same date. In future the statutes will be quoted by chapters and not by dates, in compliance with the mode adopted by Mr. Tyng, in the third volume of our Reports.

At the end of each volume a full index of the principal matters will be subjoined; and with the last volume will be given a supplement, in which the work will receive such additions and corrections as may be deemed necessary to supply its defects, and rectify its errors. In the mean time, the compiler solicits the candour of the profession towards a work, upon which no small degree of diligence has been bestowed; and which aspires not beyond "the humble praise of useful accuracy."

ADDENDA.

1. MISNOMER OF THE PERSON—page 17.—It is said, misnomer must be pleaded in proper person, and not by attorney; for, by making an attorney, the writ is acknowledged. F. N. B. 27, a. But, it seems, if there be a special letter of attorney for this purpose, it will be good. *See Stor. Plead.* 46, *in notis*, *cit Lut.* 11. 1 *Com. Dig. F.* 18. *J.* 17.

2. SERVICE OF WRITS—p. 30.—When any suit shall be commenced against any town (or other body corporate) a copy of the writ, or original summons, or such other legal process as may issue against them, shall be left with the clerk of such town, or with one or more of the principal inhabitants thereof, (or with the clerk, or some principal member of the body corporate) thirty days at least before the day of the sitting of the court, unto which the same shall be returnable.

3. NUDUM PACTUM—p. 170.—Mr. Justice Wilmot, in the case of *Pillans & Rose* vs. *Van Mierop & Hopkins*, observes, that "the notion of a *nudum pactum* was intended as a guard against rash and inconsiderate declarations; but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding." He further observes, that "he cannot find that a *nudum pactum*, evidenced by writing, has been ever holden bad, and that he should think it good; though where it is merely *verbal* it is bad, yet he gave no *opinion* upon its being good *always*, when in *writing*." 3 *Burr.* 1670.

"If, in consideration of a thing already done, without my request, not for my benefit, and where I was under no moral obligation to do it, I promise to pay money, that is *nudum pactum*, and void. But, if I were under a moral obligation to do a thing, and another person does it *without my request*, and I afterwards promise to pay, that is good." *Buller's Nisi Prius*, *p.* 147.

But although a moral obligation is a good consideration for an *express* promise, yet it has never been carried further, so as to raise an implied promise in law. 1 *Selw.* 51, *cit. Atkins v. Bandwell*, 2 *East.* 505.

5. TREATY OF LONDON.—p. 79, in the 2d note.—This treaty was concluded in the year 1794.

6. COSTS. For a more full exposition of this subject, as applying to the several titles, the reader is referred more particularly to this article, under the title of ASSUMPSIT.

The statute of Mar. 11, 1808, enlarging the jurisdiction of justices of the peace, and taking away costs in certain cases, did not take effect till the first day of June of the same year.

7. WHO ARE ALIENS—p. 75.—See Appendix, No. I. L. U. S. 1802, sect. 4; and L. U. S. 1804, sect. 2.

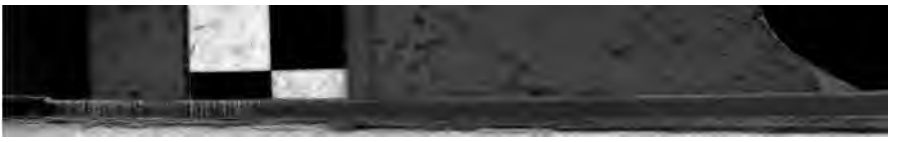
ERRATA.

Page 21, 5th paragraph, for alius dictus, read alias dictus.

Page 32, 3d paragraph, for indorsee read indorser.

Page 79, in the 2d note, beginning at the 2d line, and ending at the 4th line, read as follows: "it *was* agreed, that, &c. who *then* held lands, &c. and, &c. who *then* held lands, &c. *should continue* to hold, &c."

Page 145, in the 2d and 8th lines of the note, for *are* read *is*.



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OF VOL. I. PART I.

TITLE XVI.

TI

APPENDIX.

DIGEST

OF THE

Laws of Massachusetts.

TITLE I.

ABATEMENT.

ABATEMENT, in the general acceptation of the word, signifies a plea put in by the defendant, in which he shews cause to the Court, why he should not be impleaded, or, if impleaded, not in the manner and form he then is. 1 Bac. Abr. 1.

1st. Of pleas to the jurisdiction of the Court.

2d. Of abatement by reason of the disability of the person of the plaintiff.

3d. Of abatement by reason of coverture.

4th. Of abatement by reason of misnomer of the person.

5th. Of abatement by reason of misnomer of the place.

6th. Of abatement by reason of misnomer of the degree, or mystery; or for the want of such additions.

7th. Of abatement by reason of the omission of senior, or junior.

8th. Of abatement by reason of misnomer, or omission, of such additions as are only inducements to the action.

9th. Of abatement by reason of the want of proper parties.

I. Of pleas in abatement to the *ju*

A plea to the jurisdiction is not pr
Bac. Abr. 35. ment, though in its consequences it
concludes to the cognizance of the
ment, if the Court will have further c
whereas pleas, properly in *abatement*,
judgment of the writ, and that the sa
The defendant must plead in his p
id. not plead by attorney ; for the attorn
court ; such plea therefore, put in by
sed to be put in by leave of the Court,
edges its jurisdiction.
A plea to the jurisdiction of th
v. Hayden. 3 T. R. 24.

may avail himself of this defence under a plea which goes to the action.

According to the order of pleading, the defendant must first plead to the jurisdiction of the Court, and this he must regularly do before imparlance; for by craving leave to imparl he submits to the jurisdiction. 4 Bac. Abr. 35.

But where the want of jurisdiction *is apparent on the record*, the defendant may avail himself of the objection, arising from it, in *any* stage of the action. Martin v. Commonwealth & al. 1 Mas. T. R. 359.

So where the want of jurisdiction is *apparent on the record*, the Court, on discovering it, will dismiss the action, although no advantage be taken of this want of jurisdiction, by the defendant's plea.

As when, on motion for a new trial, in a writ *de homine replegiando*, brought originally at the Court of Common Pleas, the Supreme Court, on discovering its want of appellate jurisdiction, dismissed the appeal. Williams v. Blunt. 2 Mas. T. R. 207.

So also in an action, *quare clausum fregit*, brought originally before a Justice of the Peace, the Justice, supposing the defendant's plea to be a plea of title in the defendant, ordered him to recognize to the adverse party to enter the action at the next Court of Common Pleas, &c. From the judgment of the Common Pleas the defendant appealed to the Supreme Court. But the Court dismissed the appeal on the ground, that the plea before the Justice did not amount to a plea of *title*, and that therefore the Court had not appellate jurisdiction. Wood v. Prescott. 2 Mas. T. R. 174.

II. Of abatement by reason of the disability of the person of the plaintiff.

1. Outlawry. Outlawry in the plaintiff is a good plea in abatement, where the plaintiff sues in his own right; but not where he sues in right of another, as executor, administrator, &c. 1 Bac. Abr. 2.

By statute it is enacted, that all persons, against whom judgment of *outlawry* shall be given, shall, during the time the same judgment shall continue in force, be disabled from bringing or maintaining, *in their own right*, any civil action, or suit, in any court of law or equity within this govern- Mass. Stat. Oct. 2d, 1782, act 2, sect. 5.

ment, excepting a writ of error for reversing the outlawry.

2. ALIENAGE. Alienage in the plaintiff is also a good plea in abatement. It is, however, necessary to notice some useful distinctions, appertaining to this subject.

1 Bac. Abr. 4. Thus, as to an alien *friend*, he may maintain *personal* actions, but he cannot bring *real* actions; for it is a general rule, that an alien cannot gain a title to *real* estate, either by purchase or inheritance.

Cun. Dict. title Alien. Cro. Car. 8. 1 Vent. 417. An alien *friend* may bring an action as executor or administrator, and may have administration of *leases*, as well as *personal* things, because he has them in another's right, and not to his own use.

1 Bac. Abr. 83. As to an alien *enemy*, it is said, that such person can have neither *real*, *personal*, nor *mixed* actions.

Ibid. 84. If, however, an alien *enemy* comes here *under safe conduct*, he may maintain an action.

Ibid. 84. Ld. Raym. 282. So also, if an alien *friend* comes hither in *time of peace* and lives here under the protection of government, and a war afterwards happens between the two nations, he may maintain an action; for suing is but a consequential right of protection.

Cun. Dict. tit. Alien. The plea of alienage is both *exclusive* and *inclusive*, viz. that the plaintiff was born *without* the liegeance of this state, &c., and *within* the liegeance of the foreign dominion.

1 Bac. Abr. 85. Where alienage is pleaded in *abatement*, and the plaintiff replies, *indigena*, he may either take issue, or conclude with a verification; but if in *bar*, he must take issue.

Ibid. If alienage be pleaded to an alien *friend*, it must be pleaded in abatement or disability of the plaintiff; but if it be to an alien *enemy*, it may be pleaded either in abatement, or in bar to the action.

2 Stra. 1082. Ld. Raym. 283, 853. In pleading alienage to a *personal* action it is material to allege, that the plaintiff is an alien *enemy*; in which case, the plaintiff may reply, *safe conduct*, or *protection*, and conclude with a verification.

5 Com. Dig. Plead. 2. C. 1. 3. INFANCY. An infant must sue either by his guardian, or next friend; if, therefore, he prosecute alone, or by attorney, this may be pleaded in abatement.

III. Of abatement by reason of *coverture*.

Coverture in plaintiff is a good plea in abatement, which may be either *before* the writ sued, or *pending* the writ. By the first, the writ is abated *de facto*, but the second only proves the writ *abateable*; both are to be pleaded, with this difference, that coverture, *pending* the writ, must be pleaded, "*since the last continuance*;" whereas coverture, *before* the writ brought, may be pleaded at any time, because the writ is *de facto* abated. 1 Bac. Abr. 9.

Where the marriage does not take place till after action brought, this plea is pleadable only in case of marriage of *plaintiff*; for *defendant* cannot render void the plaintiff's action, for this would be taking advantage of her own act. 2 Ld. Raym. 1525. 2 Stra. 811.

An action of trespass, for an injury done to the wife *dum sola*, should be brought by the husband and wife; but if such action be brought by the wife alone, defendant must plead the coverture in *abatement*, and not in *bar*. Milner v. Milnes. 3 T. R. 627.

If an action be brought by A and B, as husband and wife, who in fact were not married until after the action brought, the defendant may plead this in *abatement*. For though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. 1 Bac. Abr. 9.

If a writ be brought against a married woman, and she be styled a single woman, she may plead her coverture; but if she neglect to do it, and there is a recovery against her as a single woman, her husband may avoid it by *writ of error*, and may come in at any time and plead it. Ibid. Latch. 24.

IV. Of abatement by reason of misnomer of the *person*.

Misnomer is a good plea in abatement; as if *John* be sued by the name of *Thomas*, he may plead, that, at the time of the writ purchased, he was called and known by the name of *John*: For, since names are the only marks and indicia of things that human kind can understand each other by, if the name be omitted or mistaken, there is a complaint against nobody. 4 Bac. Abr. 38.

This rule applies as well to the plaintiff's, as the defendant's name. If, therefore, the plaintiff's christian or Com. Dig. Abate. E. 18, 19. 1 Bosan. & Pul. 44.

surname be misnamed, the defendant may plead it in abatement.

1 Bac. Abr. 6. But though defendant may, by pleading in abatement, take advantage of a misnomer, when there is a mistake in the writ or declaration, as to the name of baptism or surname; yet, in such plea, he must set forth his *right name*, so as to give plaintiff a better writ.

Ibid. in notis. And in thus setting forth his right name, he must say, that "*by such name he was known* at the time of the writ purchased."

Haworth v. Spraggs, 8 T. R. 515. The defendant, in a plea in abatement of misnomer, must give his surname as well as his true christian name, although his true surname be used in the declaration.

3 Bac. Abr. 626. Lutw. 36. One defendant cannot plead misnomer of his companion; for the other defendant may admit himself to be the person in the writ.

2 Hal. H. P.C. 177. 3 Bac. Abr. 626. So if several persons be indicted for one offence, misnomer, or want of addition of one, quashes the indictment only against him, and the rest shall be put to answer; for they are, in law, as several indictments.

1 Bac. Abr. 6. The defendant, though his name be mistaken, is not obliged to take advantage of it in *abatement:* And, therefore, if he be impleaded by a *wrong* name, and afterwards impleaded by his *right* name, he may plead in bar the former judgment, and aver that he is *one and the same person.*

5 T. R. 487. In a plea of misnomer, it is bad to say, "the *said* C D comes, &c."; for the word *said* refers to the name in the writ, and *affirms* it.

Carth. 207. Tallant v. Germyn. As where the defendant pleaded misnomer in this form, "*and the aforesaid J. Germyn* (with an *n* at the end) comes and defends, &c. and says his name is Germy (without an *n*) and not Germyn:" Upon demurrer to this plea, it was adjudged against the defendant; for that he had admitted his name to be Germyn, by his appearing and making defence by that name; but that if he would have taken advantage of the misnomer, he should have pleaded in this manner, "*and J. Germy*, who by the name of J. Germyn is above impleaded, comes, &c. and says, &c."; and for this fault, there was judgment of *respondeat ouster.*

3 Bac. Abr. 624.

So where defendant was sued by the name of *Edward* Cotteral, and pleaded in abatement, that his christian name was *John*, but introduced his plea in this form, "*and the aforesaid* —— *Cotteral* (leaving out his christian name) *comes*, &c.;" and it was held, that the *aforesaid* —— Cotteral must be understood to mean *the aforesaid Edward Cotteral*, by which he confesses his name to be Edward: And that if he would have taken advantage of the misnomer, his plea should have been in this form, "*and John, who is sued by the name of Edward, comes*, &c." 3 Bac. Abr. 625.

If there be a mistake both in the christian name and surname, the defendant may take advantage of *both*, and his plea shall not, on that account, be held to be double; as where trover was brought against the defendant by the name of *Christopher Mature*, and he pleaded in abatement that his name was *John Metter*, and that he was known by that name. This plea was adjudged good on demurrer. 3 Bac. Abr. 625.

Misnomer must be taken advantage of by pleading it in abatement, and cannot be assigned for error; it being a rule, that a man shall not assign that for error, which he might have pleaded in abatement. Carth. 124. 4 Bac. Abr. 38.

So also if defendant neglect to plead misnomer in abatement, he may be taken in execution by the wrong name. Crawford v. Satchwell. 2 Str. 1218.

The principle established in the above case of Crawford *v.* Satchwell, has been recognized in a decision of the Supreme Judicial Court of this state. Smith v. Bowker. 1 Mas. T. R. 76.

V. Of abatement by reason of misnomer of the *place*.

It is a good addition of this kind, to name the party, *late* of such a town; in which respect this addition differs from that of the estate, degree, or mystery: And it is said, that if a defendant be named of A, and *late* of B, it is sufficient to prove either addition. 3 Bac. Abr. 620.

So also where defendant was styled, *late of London*, he pleaded, that "*he had for four years been commorant at B*," and traversed, that, at the time of the writ, *vel nuper tunc vel unquam postea*, he was of London; but the plea was set aside. 2 Stra. 924.

And the place where defendant is *conversant* is sufficient, though not *commorant* nor *inhabitant*. Barnes 162.

1 Com. Dig. ti. Abate. F. 25.

So if a man resides in one place, and has a family in another, he may be named of either, and it will be good.

VI. Of abatement by reason of misnomer, or omission, of the *degree* or *mystery*.

If the addition of *mystery* or *degree* of plaintiff or defendant be omitted, or a wrong addition be given, as if one be called *yeoman*, who is *not* yeoman, but esquire, this will be sufficient to abate the writ.

2 Inst. 665.

3 Bac. Abr. 617.

The common law did not, in any case, require any other description of a person, than by his christian and surname, unless he were of the degree of a knight, or some higher dignity; but names of dignity were always required in England, being marks of distinction imposed by public authority; and these marks of distinction were always to be made use of, as part of the name, in all legal proceedings: And indeed so scrupulous was the law in exacting the name of dignity, that if a plaintiff in an action gained a new name of dignity, pending the writ, he made it abateable. This inconvenience, however, was remedied by a statute enacted in the reign of Edward VI.

2 Inst. 666.

3 Bac. Abr. 617.

But names of worship, such as esquire, gentleman, and yeoman, since they were only names of distinction, in popular use, and not given by the public authority, were not deemed parcel of the name, and therefore were not necessary at common law.

2 Inst. 670.

3 Bac. Abr. 617.

However, in the time of Henry V. it was perceived, that the christian and surname were not sufficient denominations of persons, and did not sufficiently avoid the confusion that might happen by the mistake of persons; and that an innocent person might, upon a process of execution, be distrained, upon having the same name with the real defendant; an act was therefore passed in the first year of that king's reign, by which the name of worship was made as necessary as the name of dignity was before.

Although names of dignity are unknown in our government, yet our law requires that the litigating parties should be as clearly described as possible, either by their *degree* or *mystery*.

The word *mystery*, includes all lawful arts, trades, and occupations; and if one, under the degree of a gentleman, have divers of such arts, he may be named by any of them. 2 Inst. 668. 3 Bac. Abr. 619

A trader may be sued by his degree, or by his trade; and if by his degree, the writ shall not abate, unless he shews that he has a higher degree. So also, if he be sued by his trade, he cannot plead that he is of a degree, but only that his trade is misnamed. Str. 556, 816. Ld. Raym. 1541.

It is said to be no fault to give an esquire the addition of gentleman; and that esquire and gentleman is no variance. 4 Bac. Abr. (Gwillim) 754, in notis.

Widow, single woman, are sufficient additions of a woman. 3 Bac. Abr. 619.

If several defendants have the same addition, it is safest to repeat the addition after each name. Ibid.

It has been held a fatal fault, to apply the addition to the name, which comes under the *alius dictus* only, and not to the first name: but it is said not to be material whether any addition be put to the name which comes under the *alius dictus*, or not; because what is so expressed is not material. Cro. Eliz. 583. Dyer 88. Semple's Case. 2 Leach. C.L. 469.

VII. Of abatement by reason of the omission of senior or junior.

If a father have the same name and addition with his son, the writ against the son is abateable, unless the addition of *younger* be added to the other additions. But if a father alone be a defendant, there is no need of the addition of *elder*. 3 Bac. Abr. 619.

And where the father and son have the same name, and the writ contains no addition of senior or junior, the father will be intended *prima facie*; the above additions are unnecessary where there is any matter that distinguishes them. Lepiot v. Browne. H. 2 Ann. K.B. 1 Salk. 6.

And in no case is there need of the addition of senior or junior, except where there is a father and son of the same name. 1 Com. Dig. Abate. F. 21.

VIII. Of abatement by reason of misnomer, or omission, of such additions as are only *inducements to the action.*

3 Bac. Abr. 620.

When any particular character or relation gives any person rights and privileges, or makes him subject to any burthen; to demand the one, or be liable to the other, the particular character or relation ought to be set forth; for, since it is the cause of the action, it must certainly be material; and therefore when persons sue or are sued, as heirs, executors, or administrators, they must be named as such, for these are necessary conveyances or inducements to the action, which, if mistaken, are fatal.

If this inducement be not at first in a declaration, yet, if it afterwards appears that the party is charged as executor, this is sufficient.

Dean v. Guyse, Saun. 111. 3 Bac. Abr. 621.

As if an action of covenant be brought against I S, executor, and he is not at first named I S, executor of the last will and testament; but afterwards it is shewn, that the testator did covenant and bind himself, his executors, &c. and made I S his executor, and died; and a breach is assigned; this is sufficient, without a formal nomination.

Harding v. Salkill. Salk. 296. 1 Esp. Dig. 298.

If an action is brought against a person as executor, and he pleads, *that he is not executor, but administrator*, it must be pleaded in *abatement*, and not in *bar*; for a recovery against one, as executor, is a good bar to another action for the same cause against him as administrator.

Fooler v. Cooke. Salk. 297. Powers v. Coote. Salk. 298. 1 Esp. Dig. 298.

And where defendant does so plead that he is *administrator*, in abatement, he need not traverse, that he ever intermeddled as executor, which he might have done, and so have been executor *of his own wrong*. For it shall not be intended that he did so, as all acts are presumed to be lawful, till the contrary appears. For if in fact the defendant was *executor of his own wrong*, plaintiff might reply it; and besides, defendant need only traverse that which plaintiff has alleged in his declaration.

1 Esp. Dig. 299.

But if defendant is sued as administrator of I S and pleads *that he is executor*, then defendant must go on and traverse, "*without this that I S died intestate;*" and the reason is, that unless there was a dying intestate, no action

can be brought against one as administrator, and to say that he was executor, is, by *implication*, only an answer to the dying intestate.

IX. Of abatement by reason of the want of *proper parties*.

The want of proper parties is also a good plea in abatement, as that there are other persons, not named, who ought to be made co-plaintiffs or co-defendants. Lawes' Plead. 105.

As where there is a partnership demand, *all the partners should join in the action*, for the contract and undertaking is joint; and if, in such case, one partner only brings the action, defendant may take advantage of it at the trial, and non-suit the plaintiff; for the contract is not the same. But in case of a *tort*, this must be pleaded in abatement. Leglise v. Champante. 2 Stra. 810. 1 Esp. Dig. 116.

But if an action of *assumpsit* is brought *against* one partner, without joining the other, defendant must take advantage of it by pleading that matter in abatement; for if he was allowed to give it in evidence, and so non-suit the plaintiff, it would be endless litigation, unless plaintiff knew all the partners. But when defendant pleads in abatement, he sets out all his partners, and the plaintiff knows against whom to proceed. Abbot v. Smith. 2 Black. Rep. 947. 1 Esp. Dig. 117.

For all contracts with partners are joint and several, and every partner is liable to pay the whole; and in what proportion the others are to contribute is a matter merely among themselves; plaintiff may however bring his action against *one*, but *that one* may, by plea in abatement, compel plaintiff to join them all: and if he brings his action against all, yet he may take out execution against one only. Per Ld. Mansf. 5 Burr. 2613. 2 Black. Rep. 696. 1 Esp. Dig. 117.

But if one partner is out of the state, and not amenable to the process of the court, defendant may proceed singly against the other. Darwent v. Walton. 2 Atk. 510. 1 Esp. Dig. 117.

If the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; if *ex delicto*, he may sue all, or any one. And the same rule applies, where a *tort* is committed by a *servant* of the defendant sued. Therefore, to an action on the case against several partners Mitchell v. Tarbutt. 5 T. R. 649.

for negligence in their servant, whereby the plaintiff's goods were lost, it cannot be pleaded in abatement, that there are other partners not named.

Gilbert v. Bath. 1 Stra. 503. 1 Esp. Dig. 284.

If two are bound jointly in a bond, and one only is sued, the other must take advantage of it by pleading in abatement; for if he demand oyer and demurs, plaintiff shall have judgment, for the Court will presume that the other never sealed it.

Co. Litt. 282. A. 1 Esp. Dig. 284.

And in such case, where one only is sued, he cannot plead, *non est factum*; for it is his deed, though not his *sole* deed.

Hollingsworth v. Ascue, Cro Eliz. 355. 1 Esp. Dig. 284.

And therefore where defendant does so plead this matter in abatement, "*that another was bound with him*," he must plead further, "that the other *did seal and deliver* it as his deed," or the plea will be bad; for by such means only is the deed good; and, without such averment, the Court will presume that the other never did seal it.

Spencer v. Durant. 1 Show. 8. 1 Esp. Dig. 285.

If a bond be made *to* several, they must all join in the action, for their interest is joint, and they cannot have several actions. The bond, in this case, was to the plaintiff, *and another*, and *to each of them*, that is, joint and several.

Cro. Eliz. 202. 1 Esp. Dig. 285.

But if the bond be so, and one only brings the action, defendant must take advantage of it by pleading in *abatement*; for if he pleads it in *bar*, is is bad, and plaintiff shall have judgment.

2 Stra. 1146. 1 Esp. Dig. 370.

So also, where there is a joint covenant *by* several, *all* should join in the action, or on demurrer on *oyer* it will be bad.

Bull. N. P. 158. 1 Esp. Dig. 371.

But if any, named in an indenture, have not sealed it, they should be excluded by an averment to that effect. But advantage must be taken by pleading in *abatement*, if the action be brought *against* part only of the covenantors.

2 Salk. 440. 2 Esp. Dig. 402.

So where goods are lost, which have been put on board a ship, and an action is brought against the owners of the ship, in such case the owners should *all* be joined in the action; for it is *quasi ex contractu* as to all.

5 Burr. 2611. 2 Esp. Dig. 402.

Though if one only be sued, he must plead it it *abatement* that there are other partners, for he shall not be allowed to give it in evidence, and nonsuit the plaintiff.

At common law, joint-tenants, in actions both real and personal, must jointly *sue* and be jointly *sued*. Co. Litt. 180. b. 3 Bac. Abr. 215.

It is however otherwise in the case of tenants in common, who need only join and be joined in *personal* actions. 3 Bac. Abr. 216.

And now in regard to co-heirs and joint-tenants, it is enacted by statute, that in actions of waste, ejectment, or other real actions, where possession of the inheritance, alleged to have descended, is the object of the suit, they may all, or any two, or more of them, join therein, or each one may prosecute for his particular share of such inheritance; and the same rule shall extend to joint-tenants, who are, or may be, disseized. Mass. Stat. March 9, 1786, act 2, sect. 3.

But tenants in common must join in actions *personal*, as trespass in breaking into their house, destroying their grass, cutting their timber, &c. and shall recover their damages *jointly*; because in those actions, though their estates are *several*, yet the damages survive to all; and it would be unreasonable to bring *several actions* for *one single* trespass. Co. Litt. 198. a. 3 Bac. Abr. 216.

If defendant be tenant in common with plaintiff, he may give this matter in evidence under the general issue; for, at common law, one tenant in common cannot have trespass against another. Salk. 4. Litt. Sec. 323. 2 Esp. Dig. 103.

But by statute, tenants in common, joint-tenants, and co-parceners, may have reciprocal actions of waste against each other for committing depredations upon the ore or timber appertaining to the land thus held in common. Mass. Stat. March 9, 1786, act 2, sec. 1, 2.

So if one tenant in common *destroys* the thing held in common, the other may have trover against him for it; for that is a total conversion to his own use of what he had only a part. Co. Litt. 200. a. 2 Esp. Dig. 348.

As where one part owner of a ship took her and sent her to the *West Indies*, where she was lost, and the other owners bringing an action for it, Ld. King left it to the jury, whether, they being tenants in common of the ship, this was not a *destruction* by the defendant, and the jury found accordingly. Bull. N P. 34. 2 Esp. Dig. 348.

cannot plead in abatemei

Hart v. Fitzgerald. 2 Mass. T. R. 509.

In replevin, where, fro the plaintiff was but part the Court, *ex officio*, abate

X. Of abatement by r *parties.*

3 Bl. Com. 302.

By the laws of England, ing the suit, is at once an al

But in this commonwea enacts, that in case of the d

Mass. Stat. March 4, 1784, sect. 10.

appellant or appellee, before pealed unto; or where any depending, either in the Cour Supreme Judicial Court, in a wealth, and it so happen tha by death before final judgmei trator of such deceased party, ant, or defendant, (in case the survive) shall have full power such suit or action, from cou ment; and the defendants o swer to such suits accordingl Common Pleas and Supreme such causes may be triable an to hear all such causes, proc execution accordingly.

Where a party dies, pending a suit, (in case the cause of action survives) the executor or administrator may come in, and prosecute or defend the same.

Mass. Stat. March

before final judgment, and the executor or administrator of the deceased party, after taking upon himself the said trust, shall neglect or refuse to become a party to the suit, the Court before whom such cause shall be pending (in case the cause of action doth by law survive) may enter up judgment against the goods and estate of the deceased party, in the same way and manner judgment might have been, in case the executor or administrator had voluntarily, after such death, made himself a party to the suit; provided, that such executor or administrator be duly served with a notification from the clerk of the court, where such suit is pending, fourteen days beforehand.

the same, judgment may be rendered against the estate of the deceased.

Provided, such executor or administrator be served with a notification.

It appears then, that it is only such actions, the causes of which do not *survive*, that are abated by the death of the party.

What actions do, and what actions do not, survive.

As to what actions *do*, and what do *not* survive,—in actions merely *personal*, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is, that *personal actions die with the person:* But in actions arising *ex contractu*, by breach of promise, and the like, there the right descends to the executor and administrator, and the cause of action is said to *survive*.

3 Bl. Com. 302.

Barnard v. Harrington. 3 Mass. T. R. 228.

So also in replevin, if *defendant* dies, pending the suit, his executor or administrator cannot come in and defend, because the action is founded on a tort, which does not survive against the executor or administrator. But if *plaintiff* in replevin dies, his executor or administrator may come in and prosecute within the equity of the statutes of 4 Edward 3d. c. 7. and 31 Edward 3d, c. 11.

Pitts v. Hale, 3 Mas. T. R. 321.

We have no statute which makes provision for cases where there is a plurality of plaintiffs or defendants, and one dies pending the suit. In such case, at common law, the writ would, under certain circumstances, be abated. To remedy this inconvenience, the stat. 8 & 9 William III. enacts, that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action should *survive* to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such

Of cases, where there are a plurality of plaintiffs or defendants, and one dies pending the suit.

4 Bac. Abr. 42.

death, being suggested on the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants, &c. The above statute has probably been adopted in this state, and has become part of our own law.

See Stor. Plead. 70, in notis.

If a writ of error is brought by two persons upon a judgment against themselves and another, and the death of the third person is not suggested, the Court will quash the writ upon motion.

Andrews v. Bosworth, 3 Mass. T. R. 223.

It ought here to be noticed, that we have two statutes, the first authorizing the successors of *overseers of the poor*—the second authorizing *treasurers* to prosecute suits commenced by their predecessors.

Overseers of the poor and treasurers to prosecute suits commenced by their predecessors.

The first enacts, that no action, brought by *overseers*, shall abate by the death of some of them, or by their being succeeded in office, pending the action, but it shall proceed in the names of the original plaintiffs, or the survivors of them.

Mass. Stat. Feb. 26, 1794, act 5, sect 5.

The second statute enacts, that the treasurer of the commonwealth, the treasurers of counties, towns, parishes, and other corporations, for the time being, are empowered to prosecute to final judgment and execution, any suits commenced by their predecessors in said capacity, and pending at the time of their removal.

Mass. Stat. June 22, 1797, act 1.

If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in abatement; because it falsifies the writ, and because the right was in the survivors at the time of suing the writ, and the writ not accommodated as the case then was.

4 Bac. Abr. 42.

XI. Of abatement by reason of *the pendency of another action for the same thing*.

Whenever it appears of record, that the plaintiff has sued out two writs against the same defendant for the same thing, the first not being determined, the second writ shall abate: For the law abhors multiplicity of actions, and will not allow that a man shall be twice arrested, or twice attached by his goods for the same thing; for if he might suffer *twice*, by the same reason he might suffer *in infinitum*.

4 Bac. Abr. 48.

But it is no good plea in abatement of an *indictment*, that there is another indictment, against the same defendant, for the same offence; but in such case, the court will, in discretion, quash the first indictment. 4 Bac. Ab. 48, in notis.

It is not necessary that both actions should be pending *at the time of defendant's pleading in abatement:* For if there was a writ in being at the time of suing out of the second, it is plain the second was vexatious, and ill *from the beginning*, and therefore could not be rectified by a subsequent determination of the first; but then it must appear plainly to be for the same thing. 4 Bac. Abr. 48.

The law is so watchful against all vexatious suits, that not only it will not suffer two actions *of the same nature* to be pending for the same demand, but not even two actions *of a different nature.* Ibid.

Therefore it is a good plea in *trespass*, that plaintiff has brought *replevin* for the same thing, because, in both cases, damages are to be given for the caption. Ibid. 49, in notis.

A writ of error depending, is a good plea in abatement, to an action of debt upon a judgment. 1 Raym. 47.

If a second writ be brought, tested the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. Allen 34. 1 Bac. Abr. 14.

If an action, pending in the same court, be pleaded to a second action brought for the same thing, the plaintiff may pray that the record may be inspected by the court, or demand oyer of it, which, if not given in convenient time, he may sign his judgment. Ld. Raym. 347. 4 Bac. Abr. 49.

This plea must not only shew the former action to be *pending*, but must likewise be pleaded *prout patet recordum;* for, without reference to the record, plaintiff can neither pray oyer, nor reply *nul tiel record:* And for want of this, there was a general demurrer, and judgment of *respondeat ouster.* Clifford v. Cony, 1 Mass. T. R. 495.

If another action, pending in the same term, be pleaded in abatement to a *qui tam* action, the defendant must shew the *particular time when the other action was commenced*, that the court may see that the priority of right of action attached elsewhere; or the plea will be bad. Combe v. Pitt, 3 Burr. 1423.

XII. Of abatement by reason of *some defect appertaining to the writ.*

1. Bad Test. If the writ bears test of a justice, who is a party to the action, this matter may be pleaded in abatement. So also, if the writ does not bear test of the *first* justice, who is *not such party*. So, it is presumed, if the test be *wanting:* for the test is essential to give the writ authority.

Mass. Stat. July 3, 1782, act 5, sect. 1. It is enacted by statute, that all writs and processes, issuing from the several courts of common pleas, shall bear test of the first justice, who is not a party, and be under the seal of the court, and signed by the clerk thereof.

Mass. Stat. July 3, 1782, act 3, sect. 3. The same provision is made, in case of writs issuing from the supreme judicial court.

2. Bad Service. If it appears, by the officer's return, that the defendant has not received such notice, as is required by law, this may be pleaded in abatement.

To ascertain what *is*, and what is *not* proper notice, it may be necessary to attend to the following provisions by statute.

Mass. Stat. Feb. 17, 1798, act 2, sect. 1. 1. When the goods or estate of any person shall be attached at the suit of another, in any civil action, a summons, in form prescribed by law, *shall be delivered to the party, whose* goods or estate are attached; *or left at his or her dwelling-house, or place of last and usual abode, fourteen days before the day of the sitting of the court*, where such writ is returnable; and in case the defendant was, at no time, an inhabitant or resident within the commonwealth, then such summons must be left with his or her tenant, agent, or attorney; and the service thereof, in either case, must be certified, by a sworn officer that executed the attachment, or by some other sworn officer, or by affidavit, made in court, by the person that delivered the same, and by one other credible witness, then present: Otherwise, the writ shall abate.

Notice, where the suit is by attachment.

And where the defendant was at no time an inhabitant of the commonwealth.

Evidence of the service.

Mass. Stat. Feb. 17, 1798, act 2, sect. 2. 2. In all suits, wherein the process is by original summons, as against executors, administrators, or guardians, in ejectment, dower, scire facias, error, review, and all other civil actions, wherein the law does not require a sep-

Notice, where the suit is by original summons.

arate summons to be left with the defendant, the service thereof, by the proper officer, shall be good and valid in law, either by his reading the writ or original summons to the defendant, or by leaving a true copy thereof at his or her house, or place of last and usual abode, attested by such officer, fourteen days before the day of the court's sitting, whereto the same process shall be returnable.

3. In all actions, wherein the process shall be by original summons as aforesaid, and in which the defendant was at no time an inhabitant or resident within the commonwealth, then the service thereof shall be, in like manner, by the proper officer's reading the same to, or leaving a like copy, duly attested, with the tenant, agent, or attorney of the defendant, the like number of days before the day of the court's sitting, whereto the same process shall be returnable.

Mass. Stat. Feb. 17, 1798, act 2, sect. 3.

Notice, where such defendant was at no time an inhabitant of the commonwealth.

4. In actions of dower, and other real actions, wherein it shall so happen, that the possession of lands or buildings shall be demanded, in the writ, not of the tenant in the actual possession or occupancy thereof; in addition to a service on the defendant, in the writ or summons as aforesaid, there shall be a service on such tenant or occupant in possession, the like number of days before the day of the court's sitting, by the proper officer's reading to him or her the same writ or original summons, or leaving a like attested copy, at his or her house, or place of usual abode on the premises, which shall also be certified by the proper officer; or the writ shall abate.

Mass. Stat. Feb. 17, 1798, act 2, sect. 4.

Notice to the tenant in possession, required in real actions.

Officer's return.

5. The fourteen days' notice, above spoken of, must apply only to cases of writs returnable to the common pleas, and supreme judicial court; for in writs returnable to a justice of the peace, the law requires but *seven* days' notice to the defendant.

Mass. Stat. March 11, 1784, act 3, sect. 1.

Notice, where a suit is before a Justice of the Peace.

So also is it a good plea in abatement, that the service of the writ was by an *improper officer;* as where the writ is served by a *sheriff*, where it ought to have been done by a *coroner*; or by a *constable*, where it ought to have been by a *sheriff*; and the like.

The service must be by a proper officer.

3. WRONG VENUE. If the action be not brought in the proper county, this is also good cause of abatement.

Mass. Stat. Oct. 30, 1784, sect. 13.

By statute it is provided, that when the plaintiff and defendant both live within the commonwealth, *all personal and transitory* actions shall be brought in the county where one of the parties lives. And when an action shall be commenced in any other county than as above directed, the writ shall be abated, and the defendant allowed double costs.

Mass. Stat. Oct. 30, 1784, sect. 11.

4. No Indorser. If the writ be not indorsed, defendant may plead this matter in abatement. By statute it is provided, that all original writs, issuing out of the supreme judicial court, or courts of common pleas, shall, before they are served, be indorsed on the back thereof, by the plaintiff or plaintiffs, or one of them, with his christian and surname, if he or they are inhabitants of this commonwealth, or by his or their agent or attorney, being an inhabitant thereof; and where the plaintiff is not an inhabitant of this commonwealth, then his writ shall be indorsed, in manner aforesaid, by some responsible person, who *is* an inhabitant of this commonwealth.

Original writs must be indorsed.

Whiting v. Hollister, 2 Mass. T. R. 102.

But if defendant wishes to plead this matter in abatement, he must do it at the same term the writ is returned. For the provision of the statute was made for the security of the defendant, which, if he pleases, he may wave; and if, at the term the writ is returned, he does not except to the want of an indorsee, either by a plea in abatement, or perhaps by moving the court to nonsuit the plaintiff, he must be considered as having waved the security provided for his benefit.

No indorser must be pleaded at the term the writ is returned.

Gould v. Barnard, 3 Mass. T. R. 199.

In replevin, if defendant pleads the want of an indorser in abatement of the writ, without any suggestion entitling him to possession of the goods, and the writ is abated, he shall have judgment for his costs, but not for a return.

XIII. Of the general requisites of pleas in abatement; and herein of the *beginning* and *conclusion*, proper in such pleas.

Lawes' Plead. 107.

The general requisites of a plea in abatement are, that it should be certain to every intent, give the plaintiff a better writ, and have an apt and proper beginning and conclusion; for it is the beginning and conclusion, which makes the

plea. Except in these particulars, pleas in abatement are governed by the same rules of pleading as apply to pleas in bar.

If a man plead matter which goes in *bar*, but *begins and concludes* his plea in *abatement*, it will be a plea in *abatement*; for it is the *beginning and conclusion* that make the plea. But if he *begins in bar*, though he *concludes in abatement*, or *concludes in bar*, though he *begins in abatement*, it will be a plea in *bar*. Per Holt. Ld. Raym. 593. Ld. Raym. 694.

Where the defendant pleads to the writ, &c. for matter *contained in and apparent upon the face of it*, he should, after making defence, *begin his plea* by praying judgment of the writ, and that the same may be quashed, that is, held void, and *conclude his plea* in the same manner; but where he pleads to the writ, for matter *dehors*, or out of it, as joint-tenancy, non-tenure, or the like, he should only *conclude* his plea in this manner. Lawes' Plead. 108-9. Tidd. 584.

Where the writ abated *de facto*, (that is, by the mere matter in abatement, though it had not been pleaded) the plea concludes by praying judgment, if the court will further proceed. Lawes' Plead. 109.

Pleas, to the person, properly conclude with praying judgment, *whether the defendant ought to answer*; or whether *the plaintiff ought to be answered*, if the disability be continuing; or *that the plaint may remain without day, until, &c. viz. until the disability be removed*, if it be temporary only. Ibid.

Pleas, to the jurisdiction, conclude with praying judgment, if the court will take further cognizance of the suit. 4 Bac. Abr. 35.

XIV. Of the *defence* necessary in pleas in abatement.

Defence is two-fold, viz. half defence and full defence.

The first is expressed thus, "*and the defendant comes and defends the force and injury, (or wrong and injury) when, &c.*" The second sort of defence is thus expressed, "*and the defendant comes and defends the force and injury, (or wrong and injury,) and damages, and whatsoever he ought to defend, when and where the court,*" &c. The word "*comes*" has been determined to be no part of the plea, so that if defence be made without it, it is good; for his Lawes' Plead. 89.

making defence shews the defendant to be in court, and makes him a party to the plea.

Lawes' Plead. 90. By defending the *wrong and injury*, the defendant waves all objections to the statement of it in the writ, as misnomer; by defending *the damages*, &c. he admits that the plaintiff may claim them; therefore all exceptions to his person are waved; and by saying, *when and where the court*, &c. he admits that the court has jurisdiction of the cause.

Ibid. But if a man pleads in disability of the plaintiff, he may defend *the force and injury*, (*or wrong and injury,*) and demand judgment, *if he shall be answered*; and it seems that he may object to the jurisdiction, after defending the damages, &c. merely.

Ibid. 92. Although a defendant cannot plead in abatement, after making a full defence, yet he must defend *the force and injury* (or the *wrong and injury*) *when*, &c. before he can plead in abatement, to the disability of the person.

8 T. R. 631. Lawes' Plead. 92. But in general, the "&c." in making defence, will imply a *half* defence, in cases where such defence ought to be made, and will be understood as a *full* defence, if that is necessary.

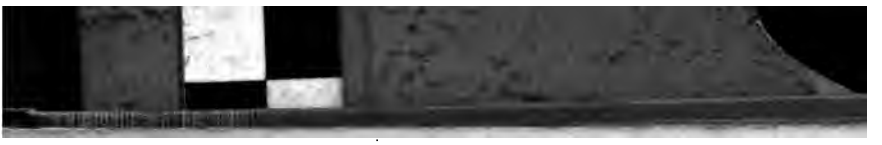
XV. Of pleading *different pleas* in abatement.

Lawes' Plead. 107. The rule, that several pleas, containing distinct matters, to one and the same thing, whereunto several answers are required, shall not be allowed, extends only to pleas *perpetual and peremptory*, and not to such as are not perpetual but *dilatory*; for, in their time and place, a man may plead several of them. And the defendant may sometimes plead in abatement to part, and in bar to the residue, not only in debt, but in other actions.

Co. Litt. 304. a.

Lawes' Plead. 107. Thus, in assumpsit, he may plead, that some of the promises, mentioned in the declaration, were made by himself, *and other persons not named*, and totally deny *that he made*, or was concerned in making, the other promises mentioned in the declaration.

Ibid. 108. But the defendant never pleads in abatement and in bar, to the same part of the writ, or declaration, at the same time; nor does he ever, at once, plead several different



pleas in abatement to the *whole*, or the *same part* of the declaration.

XVI. *At what time* pleas in abatement must be pleaded.

By the English authorities, pleas in abatement are inadmissible, after a general imparlance, that is, after a general *continuance*; and so has it been decided by the supreme court of this state. 4 Bac. Abr. 51. 1 Mass. T. R. 347.

But this rule does not apply to cases, where the cause of abatement does not accrue till *after the continuance*; as where, after a continuance, plaintiff dies, and the cause of action does not survive: Or where, after a continuance, and pending the suit, plaintiff, being a feme, intermarries. Mass. Stat. March 4, 1784, sect. 10. 4 Bac. Abr. 39.

It is also provided by statute, that all pleas in abatement to the writ, and demurrers to declaration, shall be made, signed, and filed, before the jury is impannelled. Mass. Stat. July 3, 1782, act 5, sect. 6.

XVII. How far pleas in abatement are *restrained*.

1. Though a plea in *bar*, being certain to *common* intent, is good, every dilatory plea, or in *abatement*, must be good to *every* intent: For as pleas in abatement are purely dilatory, and rest their objection on some fact or point distinct from the merits of the case, so the law requires, on their part, the most critical exactness, both in substance and in form. Their substance must be manifestly sufficient, and their form must be technically precise. A defect, in either of these particulars, may be taken advantage of by a *general* demurrer. Cro. Jac. 82. Clifford v. Cony, 1 Mass. T. R. 495.

2. It is also ordained by statute, that no summons, writ, declaration, process, judgment, or other proceeding, in the courts, or course of justice, shall be abated, arrested, quashed, or reversed, for any kind of *circumstantial* error or mistake, when the person and case may be rightly understood by the court, nor through defect or want of *form only*; and the court, on motion made, may order amendments. Mass. Stat. Oct. 30, 1784, sect. 14.

That we may the better understand this provision of our own statute, it may be of use to notice one of the English statutes of amendment, and the construction which it has received from the English courts.

1 Bac. Abr. 92.

By stat. 18 Eliz. c. 14, it is enacted, that, after verdict given in any action, &c. judgment thereupon shall not be stayed or reversed for want of *form*, touching false latin, or variance from *the register*, or other faults in *form*, &c.

Playter's case, 5 Co. 35.

In applying the above quoted act, 18 Eliz. to matter of *substance* and matter of *form*, the court unanimously laid down this distinction, that the want of *form*, within the said act, is such matter *of course*, that the clerk might have *supplied and amended it, without any information of the party*, for the party ought to inform the *truth of the matter*, and the clerk ought to draw it into *form*; but in the case at bar, (in which the number and quantity of the fish, in trespass, were not set forth) the clerk, without the information of the party, could not know the nature and number of them, and therefore *it is not want of form within the act*.

4 Bac. Abr. 51.

3. Pleas in abatement are not received after a *respondeat ouster*, for then they would be pleaded *in infinitum*.

Ibid.

4. Nothing can be pleaded in abatement of a *scire facias*, upon a judgment, that was pleadable in the original action; for it would be unreasonable that defendant should disable plaintiff from having execution, since he admitted him able to have his judgment.

Ibid.

5. The defendant cannot plead, in abatement, *two* outlawries, &c.; duplicity being a fault in *abatement*, as well as in *bar*.

XVIII. In what cases defendant may plead *in abatement or in bar, at his election.*

4 Bac. Abr. 46.

Whatever destroys the plaintiff's action, and disables him *forever from recovering*, may be pleaded in bar; but the defendant is not always obliged to plead such matter in *bar*, but may sometimes plead it in *abatement*.

Presgrave v. Saunders. Salk. 5. 2 Esp. Dig. 12.

As in *replevin* for goods, defendant may plead property *in himself, or in a stranger*, either in bar or in abatement; for if plaintiff cannot prove property in himself, he fails of his action forever; and it is of no avail to him *who* has the property, if *he* has it not.

4 Bac. Abr. 50.

If a matter, which may be pleaded either in abatement or in bar, be pleaded in abatement only, if plaintiff replies, or demurs in bar, this will be a discontinuance; because the plaintiff does not maintain his writ, and the defendant

may have other matters in bar, of which he would thereby be excluded.

XIX. Of the *judgment* on a plea in abatement, and how far peremptory.

The judgment for the defendant, on a plea in abatement, is, *that the writ be quashed;* and for the plaintiff, *a respondeat ouster.* 4 Bac. Abr. 51.

But if an issue in fact be joined on a plea in abatement, and it be found for the plaintiff, it shall be peremptory against the defendant, and the judgment shall be, that plaintiff *recover;* because the defendant, choosing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence. Ibid.

But on an indictment for a capital offence, although defendant pleads in abatement, and issue be joined, which is found against the defendant; yet the judgment will not be peremptory, but defendant will be allowed to plead in chief to the offence. 1 Gwillim's Bac. 29, in notis.

Also, if defendant demurs in abatement, the court will give final judgment, because there can be no demurrer in abatement; for if the matter of abatement be *dehors*, it must be pleaded; if *intrinsic*, the court will take notice of it, *ex officio*. 4 Bac. Abr. 51.

But a demurrer in abatement, to an indictment for a capital offence, shall not conclude the party, but he shall have leave to answer over to the offence. 1 Gwillim's Bac. 29, in notis.

If there be two defendants, and they plead two several pleas in abatement, and there be issue to one, and demurrer to the other, if the issue be found for the defendant, the court will not proceed on the other; and so *vice versa;* for in both cases, the writ being once abated, it would be impertinent to judge whether it ought to abate on the other's plea. 4 Bac. Abr. 51-2.

XX. Where the writ is abated *de facto;* or is only *abateable.*

When the writ is *de facto* a nullity, so that judgment thereon would be erroneous, then the writ is *de facto* abated. 4 Bac. Abr. 44.

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Hart v. Fitzgerald, 2 Mass. T. R. 509. it ought to abate, there t
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XXI. Where the writ

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TITLE II.

ACCESSORIES.

AN *accessory* is he, who is not the chief actor in the offence, nor present at its perpetration, but is someway concerned therein, either *before* or *after*, the fact committed. 4 Bl. Com. 35.

1st. What offences admit of accessories, and what *not*.
2d. Who may be an accessory *before* the fact.
3d. Who may be an accessory *after* the fact.
4th. Of the prosecution and trial of accessories.
5th. How accessories are punished.

I. What offences admit of accessories, and what *not*.

In high treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in treason, upon account of the heinousness of the crime. Ibid. 1 Hal. P. C. 613.

So too in trespass, and in all crimes under the degree of felony, there are no accessories, either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals: The same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason, all are principals, by reason of the magnitude of the crime; in trespass, all are principals, because the law does not descend to distinguish the different shades of guilt in petty misdemeanors. 1 Hal. P. C. 613. 4 Bl. Com. 36.

Also such offences as, in construction of law, are sudden and unpremeditated, do not admit of an accessory *before* the fact.

Therefore, manslaughter admits not of an accessory before the fact; for it is the consequence of a sudden act of passion, or of highly culpable carelessness; or it is done unintentionally, but in the prosecution of some unlawful act. 1 Hal. P. C. 615.

1 Hal. P. C. 613. If the legislature enact an offence to be felony, though it mention nothing of accessories, either *before* or *after* the fact, yet, virtually and consequentially, those, who counsel or command the offence, are accessories *before* the fact, and those who knowingly receive the offender are accessories *after* the fact.

Ibid. But if the statute, that enacts the felony, in express terms, comprehends accessories *before* the fact, and makes no mention of accessories after the fact, viz. receivers, comforters, &c. there, it seems, there can be no accessories *after* the fact; for the expression, procurers, counsellors, abettors, (all which import accessories before the fact) makes it evident, that the legislature did not intend to include accessories *after* the fact.

4 Bl. Com. 36. But in murder, and other felonies, there may be accessories; except only in those offences which, in judgment of law, are sudden and unpremeditated, and therefore admit not of an accessory before the fact, though in some instances they admit of accessories after the fact; as in the case of manslaughter, which admits of an accessory *after* the fact.

4 Bl. Com. 34. But besides accessories, there are likewise, in all offences which admit of accessories *before* the fact, what the law denominates principals in the *second* degree; for a man may be principal in an offence, in two degrees.

Ibid. A principal in the *first* degree is he that is the actor, or absolute perpetrator of the crime; and in the *second* degree is he who is *present*, aiding and abetting the fact to be done. A principal in the *second* degree therefore differs from an accessory *before* the fact, in this, that the former is *present* at the time of the crime committed, the latter is *absent* at such time.

Ibid. But this presence, necessary to constitute a principal in the *second* degree, need not be an actual immediate standing by, within sight or hearing of the deed: But there may be also a *constructive* presence; as where one commits a robbery or murder, and another keeps watch or guard at some convenient distance.

II. Who may be an accessory *before* the fact.

An accessory *before* the fact is defined to be *one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime.* 4 Bl. Com. 36.

From this it is apparent, that absence is necessary to constitute an accessory *before* the fact: for if such procurer be present, he is guilty of the crime as principal. If A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory to the murder. Ibid.

And this holds, even though the party killed be not *in rerum natura,* at the time of the advice given. As if A, the reputed father, advises B, the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder. Dyer. 186. 4 Bl. Com. 37.

So whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory *before* the fact. 4 Bl. Com. 37.

It is likewise a rule, that he, who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. Ibid.

As if A commands B to beat C, and B beats him so that he dies, B is guilty of murder as principal, and A as accessory. Ibid.

But if A command B to burn C's house, and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery; for that is a thing of a distinct and unconsequential nature. Ibid.

But if the felony committed be the same in *substance* with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies, the commander is still accessory to the murder; for the substance of the thing commanded was the *death of Titius,* and the manner of its execution is a mere collateral circumstance. Ibid.

III. Who may be an *accessory after* the fact.

An accessory *after* the fact is where a person, knowing a felony to have been committed, receives, relieves, comforts, Ibid.

or assists the felon, or accessory before the fact.* Therefore, to make an accessory *after* the fact, it is in the first place requisite that he knows of the felony committed In the second place, he must receive, relieve, comfort, or assist him.

4 Bl. Com. 37. And generally, any assistance whatever, given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory ; as furnishing him with a horse to escape his pursuers, money or food to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.

Ibid. 38. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions ; it was, therefore, at common law, a mere misdemeanor, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon*. However, by the statutes of 3 & 4 W. & M. c. 9, and 5 Ann. c. 31, such offenders were made accessories to the theft and felony.

Mass. Stat. March 16, 1805, act. 19, sect. 10. And now, by a statute of our own, it is enacted, that if any person shall knowingly harbour, conceal, or maintain any principal felon, or accessory before the fact, in any robbery or larceny, or shall receive, or shall aid in concealing any money, goods, or other articles stolen, knowing the same to have been so stolen, every such offender, upon due conviction of either of said offences, shall be deemed an accessory after the fact, to the same robbery or larceny, and shall be punished, &c.

4 Bl. Com. 38. The felony must be complete at the time of the assistance given ; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide ; for, till death ensues, there is no felony committed.

Ibid. But so strict is the law, where a felony is actually complete, that, in order to do effectual justice, the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives his brother, the master his servant, or the

* See Mass. Statutes ; for, at common law, a person cannot be an accessory *after* the fact, by receipt of an accessory *before* the fact.

servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories after the fact.

But a wife cannot become accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover him. 4 Bl. Com. 39. 1 Hal. P.C. 621.

If B commits a felony, and comes to the house of A, before he be arrested, and A suffers him to escape without arrest, knowing him to have committed a felony, this doth not make A an accessory: But if he take money of B to suffer him to escape, this makes him an accessory. 1 Hal. P. C. 619.

And so it is if A shut the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes A accessory; for here is not a bare omission, but an act done by A to accommodate his escape. Ibid.

IV. Of the prosecution and trial of accessories.

By the old common law, the accessory could not be arraigned till the principal was attainted; unless he chose it; for he might wave the benefit of the law: And therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, had stood mute, had challenged above the legal number of jurors peremptorily, had obtained a pardon, or had died before attainder; the accessory, in any of these cases, could not be arraigned. For it did not appear whether any felony was committed or not, till the principal was attainted; and it might so happen, that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. 4 Bl. Com. 323.

However, this absurdity could only happen, where it was possible that a trial of the principal might be had subsequent to that of the accessory: And therefore the law still continues, that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute 1 Ann. c. 9, if the principal be once convicted, and before attainder, (that is, before he receives sentence of death or outlawry) he is delivered by pardon, or otherwise; or if the principal stands mute, or challenges 4 Bl. Com. 323. Commonwealth v. Andrews, 3 Mass. T. R. 126. 4 Bl. Com. 324.

peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction.

4 Bl. Com. 132. It has already been observed, that the *receiving of stolen goods, knowing them to be stolen*, was a misdemeanor only, at common law, but that by statute, the offender was made accessory after the fact to the theft. But because the accessory cannot, in general, be tried, unless with the principal, or after the principal is convicted, the receivers, by that means, frequently eluded justice. To remedy which, the statute 1 Ann. c. 9, and 5 Ann. c. 31, enacted, that such receivers may still be prosecuted for a misdemeanor, though the principal felon be not before taken, so as to be prosecuted and convicted.

Mass. Stat. March 16, 1805, ch. 19, sect. 11. And now, by a statute of our own, the same provision is made, as in the English statutes above quoted, and the receiver of stolen goods is made liable by it to a prosecution for a misdemeanor. But after prosecution for such misdemeanor, the person charged shall not be liable to be prosecuted as an accessory after the fact in the same larceny.

Jac. Dict. tit. Acces. If the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and if he likewise plead the general issue, both may be tried by one inquest: But the principal must be first convicted, and the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But if the principal plead a plea in

1 Hal. P. C. 624. bar, or abatement, or a former acquittal, the accessory shall not be forced to answer till that plea be determined.

Ibid. 625. If A be indicted as principal, and B as accessory before or after the fact, and both be acquitted, yet B may be indicted as principal, and the former acquittal, as accessory, is no bar.

Ibid. 626. But if A be indicted as principal, and acquitted, he cannot be indicted as accessory *before* the fact, and if he be, he may plead his former acquittal in bar, for it is in substance the same offence.

A person, indicted as an accessory before the fact, cannot be convicted of that charge upon evidence proving him to have been *present*, aiding, and abetting. Rex v. W. & T. Gordon, 2 Leach's C. L. 581.

If a man were accessory before or after the fact, in another county, than where the principal felony was committed, it was, at common law, dispunishable; but by statute 2 & 3 Edward VI. c. 24, the accessory is indictable in that county where he was accessory, and shall be tried there, as if the felony was committed in the same county. 1 Hal. P. C. 623.

Upon the trial of the accessory, as well *after* as *before* the trial of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessory is at liberty to controvert, if he can, the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact, as in point of law. Foster. 365, &c. 4 Bl. Com. 324.

And it is now a settled and established principle, that an accessory may controvert the guilt of the principal by *viva voce* testimony, notwithstanding the record of his conviction. Rex v. Smith, 1 Leach's C. L. 323.

V. How accessories are punished.

Accessories *before* the fact, and principals in the second degree, are punished with the same degree of severity as principals in the *first* degree. Accessories after the fact are less severely punished.

Accessories after the Fact, then, are punished,

1. In Murder. By solitary imprisonment, not exceeding six months, and by confinement afterwards to hard labour, not exceeding ten years. Mass. Stat. March 15, 1805, act 21, sect. 2.

2. In Manslaughter. Our statute is entirely silent respecting accessories *after* the fact, in manslaughter, both as it regards the offence and the punishment. This is an offence which, as has already been observed, does not admit of an accessory *before* the fact; but it admits of an accessory *after* the fact. Ibid. sect. 3.

3, 4. In Burglary and Rape. By solitary imprisonment, not exceeding three months, and afterwards by confinement to hard labour, not exceeding ten years. Mass. Stat. March 13, 1806, act 6, sect. 3. Ibid. act 2, sect. 2.

5. In Robbery. By solitary imprisonment, not exceeding six months, and afterwards by confinement to hard labour, not exceeding three years;—or by fine, not exceed- Mass. Stat. March 16, 1805, act 19, sect. 10.

ing five hundred dollars, and by imprisonment in the common gaol, not exceeding three years ; or either, as the court shall order.

Mass. Stat. March 16, 1805, act 7, sect. 5.

See 3 Mass. T.R. 254. Commonwealth v. Macomber.

6, 7. In ARSON, and other MALICIOUS BURNINGS. By solitary imprisonment, not exceeding one month, and afterwards by confinement to hard labour, not exceeding five years ;—or by fine, not exceeding one thousand dollars, and by imprisonment in the common gaol, not exceeding one year, at the discretion of the court.

Mass. Stat. March 16, 1805, act 19, sect. 2.

8. In LARCENY. A person, duly convicted, before a justice of the peace, of any larceny, either as principal or accessory, before or *after* the fact, shall be punished by such fine, not exceeding *five dollars*, and imprisonment in the common gaol, for such term, not exceeding *twenty days* ; either, or both, as the justice, before whom the conviction shall be, may sentence, according to the aggravation of the offence. For the punishment, where the offender is convicted by a higher tribunal, the student is referred to the same statute of March 16. Sect. 2 & 10.

Ibid. sect, 10.

9. RECEIVER OF STOLEN GOODS. This offender is made an accessory *after* the fact, and is punished by solitary imprisonment, not exceeding six months, and by confinement afterwards to hard labour, not exceeding three years ;—or by fine, not exceeding *five hundred dollars*, and by imprisonment in the common gaol, not exceeding three years ;—or either of them, at the discretion of the court.

Ibid. sect. 13.

It ought here to be noticed, that towards this last description of accessories after the fact, *the receiver of stolen goods*, our legislature has conditionally relaxed the punishment, by enacting, that when any person, convicted for the *first* offence,* as a receiver of stolen goods, or as accessory after the fact, in any simple larceny, and not adjudged to be a common receiver of stolen goods, shall make satisfaction to the party injured by such larceny, to the full amount of the money, goods, or articles, stolen and not restored, the justices of the court, before whom the conviction may be, shall exempt such receiver and accessory from the penalty of confinement to hard labour.

Thus much as to the punishment of accessories.

* By same stat. sect. 12, if the offender has been before convicted of the same offence, or if, in the same term, he be convicted as a receiver, &c. in three distinct acts of receiving ; in such case, the punishment is solitary imprisonment, not exceeding one year, afterwards to hard labour, not less than three, and not more than ten, years.

TITLE III.

ACCOUNTS FILED IN OFF-SET.

By statute it is enacted, that when an action shall be brought to recover a debt due on book account, an account stated by the parties, a quantum meruit, quantum valebat, or for services done upon an agreed price, the defendant may file any account he hath in the clerk's office, seven days before the sitting of the court of common pleas, where the action is brought, or, if the suit be before a justice of peace, the account shall be filed before the justice, four days before the day of trial, and, upon the general issue, give the same in evidence against the plaintiff's demand. And if upon the trial it shall appear that there is a balance due to the defendant, he shall recover the same, in the same manner as if he had brought his action therefor.

Mass. Stat. Oct. 30, 1784, sect. 12.

Defendant may file an account against an action brought on book account, a quantum valebat, quantum meruit, or for services done upon an agreed price.

It will be readily perceived, that the demand, which the defendant is here permitted to file and set off against the plaintiff's claim, is such only as had arisen on *book account*; and also that this account cannot be filed against a *note of hand*, or any contract other than those which are specifically expressed. For this reason the legislature enlarged its provision, as it respects the nature both of the account filed, and the demand against which it is filed.

And now, by a further statute, it is enacted, that in any action brought, or which shall be brought, for any debt upon simple contract or promise in writing, not under seal, the defendant therein may give in evidence, under the general issue, his or her demands against the plaintiff, for goods delivered, monies paid, or services done, whereof an account shall be duly filed in the clerk's office of the court, whereto such action is or shall be brought, seven days, and before a justice, four days at least, preceding the time

Mass. Stat. Feb. 27, 1794, act 10, sect. 4.

Defendant may file an account, for goods delivered, monies paid, or services done, against an action upon any simple contract.

of trial. And in all cases of mutual demands, as aforesaid, the account of the defendant, if any time of limitation shall be objected thereto by the plaintiff, shall be considered and allowed, as if an action had been duly commenced thereon, by declaring in the same, at the time when the plaintiff's action was or shall be commenced, any law, usage, or custom to the contrary notwithstanding.

TITLE IV.

ACKNOWLEDGMENT OF DEEDS.

1st. WHAT conveyances are required to be acknowledged.

2d. What magistrate may take such acknowledgment.

3d. What shall be deemed equivalent to an acknowledgment, where the grantor is dead, is gone beyond sea, or has removed from the commonwealth, and the deed is unacknowledged.

4th. Proceedings by which to authenticate a deed before a justice of the peace, on refusal of the grantor to acknowledge it.

5th. Mode of authenticating a deed, and giving it the force of an acknowledgment, where the grantor *and the subscribing witnesses* are dead.

6th. What shall be deemed sufficient caution to all persons against purchasing, or extending execution upon, an estate already conveyed by deed, not acknowledged.

I. What conveyances are required to be acknowledged.

No bargain, sale, mortgage, or other conveyance, in fee simple, fee tail, or for term of life, or any lease for more than seven years from the making thereof, of any lands, tenements, or hereditaments, within this commonwealth, shall be good and effectual in law to hold such lands, tenements, and hereditaments, against any other person or persons, but the grantor or grantors, and their heirs only, unless the deed thereof be *acknowledged* and recorded. Mass. Stat. March 10, 1784, act 1, sect. 4.

II. What magistrate may take such acknowledgment.

The deed may be acknowledged before a justice of the peace in this state, or before a justice of the peace or magistrate in some other of the United States of America, Ibid.

or in any other state or kingdom, wherein the grantor or vendor may reside at the time of making and executing the deed.

III. What shall be deemed equivalent to an acknowledgment, where the grantor is dead, is gone beyond sea, or has removed from the commonwealth, and the deed is unacknowledged.

Mass. Stat. March 10, 1784, act 1, sect. 4.

When any grantor or lessor shall go beyond sea, or be removed out of this state, or be dead, before the deed or conveyance by him executed shall be acknowledged; in every such case, the proof of such deed or conveyance, made by the oath of one or more of the witnesses, whose names may be thereunto subscribed, before any court of record within this commonwealth, shall be equivalent to the party's own acknowledgment thereof, before a justice of the peace.

The removal of the grantor or lessor must be a *permanent* removal.

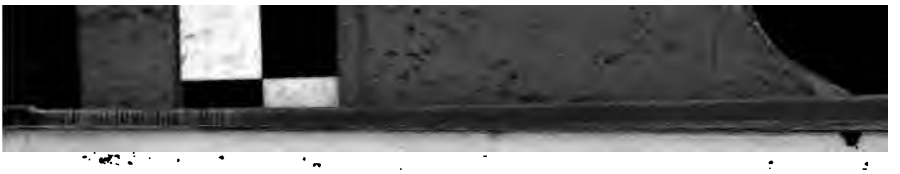
1 Mass. T. R. 58.

For where on motion to prove a deed, it appeared that the family of the grantor resided in the commonwealth, and that he was absent only for a particular purpose, and had not taken up a *permanent* residence out of the state, the court held, that this could not be considered as a *removal* within the meaning of the statute, and refused the motion.

IV. Proceedings by which to authenticate a deed before a justice of the peace, on refusal of the grantor to acknowledge it.

Mass. Stat. Mar. 10, 1784, act 1, sect. 5.

If the grantor or lessor refuse to acknowledge his deed, any justice of the peace, in the same county, after such refusal, at the request of the grantee or lessee, his heirs, executors, administrators, or assigns, may issue a summons for such grantor or lessor to appear, (if he see cause) at a certain time and place therein mentioned, to hear the testimony of the subscribing witnesses thereunto; which summons shall be served by the proper officer, seven days at least before the time therein assigned for proving the deed; and at such time and place, whether the grantor or lessor be present or not, it being made to appear by the



oath of one or more of the witnesses thereunto subscribed, that they saw the grantor or lessor voluntarily sign and seal the deed, and that they subscribed their names as witnesses thereunto at the same time, such proceedings, and a certificate thereof, under the hand of the justice, annexed to the deed (wherein the presence or absence of the adverse party shall be noted) shall be equivalent to the acknowledgment of the grantor, before a justice of the peace.

V. Mode of authenticating a deed, and giving it the force of an acknowledgment, where the grantor *and the subscribing witnesses* are dead.

Where the grantor shall be deceased, before the deed by him executed shall be acknowledged, and the witnesses, whose names may be subscribed thereto, are also deceased, the proof of the hand-writing of the grantor, and of the subscribing witnesses thereto, made by the oath of two witnesses, before any court of record within this commonwealth, shall be equivalent to the party's own acknowledgment thereof before a justice of the peace. Mass. Stat. June 28, 1787.

In such case, however, the statute requires, that it be made to appear to the satisfaction of the court, before whom such proof shall be made, that the grantee or grantees, mentioned in such deed or conveyance, have, in the life time of the grantor or grantors, taken actual possession of the real estate conveyed by such deed; and that the said grantee or grantees, or some person or persons, claiming under him or them, have continued such actual possession quietly, to the time when such application shall be made to such court, for the purposes aforesaid. Ibid.

VI. What shall be deemed sufficient caution to all persons against purchasing, or extending execution upon, an estate, already conveyed by deed, not acknowledged.

It may sometimes so happen, that before the grantee can authenticate the deed in the manner pointed out by the Mass. Stat. March 10, 1784, act 1, sect. 5.

statute, the grantor may make a second conveyance, or that some creditor of the grantor may extend his execution upon the conveyed estate. To remedy this inconvenience, the statute further provides, that if the grantor or lessor refuse to acknowledge his deed, it shall be lawful for the grantee or lessee to leave a copy of such deed or lease, compared with the original by the register, in the register's office ; and such copy, so left, shall be deemed sufficient caution to all persons against purchasing or extending execution thereon, for the space of forty days from the time of leaving such copy.

TITLE V.

ACTIONS.

AN action may be defined to be "the prosecution of one's right or claim in a court of law." 3 Bl. Com. 116.

1st. Of the different kinds of actions.
2d. At what court actions must be brought.
3d. In what county actions must be brought.
4th. At what time actions must be entered.

I. Of the different kinds of actions.

Actions are, from the subject of them, distinguished into three kinds; actions *personal*, *real*, and *mixed*. 3 Bl. Com. 117.

Personal actions are such, whereby a man claims a debt, or personal duty, or damages in lieu thereof: And likewise, whereby a man claims a satisfaction, in damages, for some injury done to his person or property. The former are said to be founded *on contracts*, the latter upon *torts*, or wrongs. Of the former nature are all actions upon debt or promises: of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like. Ibid.

Real actions, which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, commons, or other hereditaments, in fee simple, fee tail, or for term of life. Ibid.

Mixed actions are suits partaking of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained: As for instance, an action of waste, which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action, Ibid. 118. Mass. Stat. Mar. 11, 1784, act 1, sect. 3.

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Ibid. A trespass is either *im*
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ded into actions of trespass
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Ibid. Trespass *vi et armis* is th
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real property.

dressing those wrongs, which most usually occur, and in which the very act itself is *immediately* prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like ; yet, where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law, and the statute of Westm. 2. c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action ; and therefore, wherever a new injury is done, a new method of remedy must be pursued. 3 Bl. Com. 122.

Nor is it any objection, that such action was never brought *before ;* as where the lessor, coming to view the lands to see if any waste was committed, being *hindered by a stranger from entering the premises*, brought an action on the case against him ; and it was held to lie, though such action had never been brought *before*. Hunt v. Dowman, Cro. Jac. 478.

So where in trespass on the case, after a verdict for the plaintiff, it was moved in arrest of judgment, that the action was *primæ impressionis*, the court said, that every action on the case was *in itself a novelty*. 2 Esp. Dig. 435.

II. At what COURT actions must be brought.

By statute, March 11, 1784, it is enacted, that all manner of debts, trespasses, and other matters, not exceeding the value of *four pounds*, (and wherein the title of real estate is not in question) shall, and may be heard, tried, adjudged, and determined by any justice of the peace within his county. Act 3, sect. 1.

So also by the same statute it is enacted, that no action shall be sustained in any court of common pleas within this commonwealth, where the damage demanded shall not exceed the sum of *four pounds*, unless by an appeal from a justice of the peace ; saving such actions wherein the title to real estate may be concerned ; and if upon any action, originally brought before the court of common pleas, judgment shall be recovered for no more than *four* sect. 8.

pounds, debt or damage; in all such cases, the plaintiff shall be entitled for his costs, to no more than one quarter part of the amount of the debt or damage so recovered.

Sect. 1. But now, by an *additional* act, March 11, 1808, the jurisdiction of justices of the peace, in civil actions, is enlarged, and they may now try all civil actions, wherein the debt or damage does not exceed *twenty dollars*, except where the title to real estate comes in question. This last

Sect. 2. act also declares, that no action shall be sustained in any court of common pleas, where the damage demanded does not exceed *twenty* dollars, unless by appeal from a justice of the peace, saving such actions wherein the title to real estate is concerned; and if, upon any action originally brought before the court of common pleas, judgment shall be recovered for no more than *twenty dollars*, debt or damage; in all such cases, the plaintiff shall be entitled, for his costs, to no more than one quarter part of the debt or damage, so recovered.

In cases of *replevin*, if the action be brought to liberate

Mass. Stat. June 25, 1789, act 9, sect. 1. cattle that have been impounded for damages they may have committed, or to obtain a forfeiture for their going

Action of replevin. at large, the action must be brought originally before a *justice of the peace*. The statute has prescribed the form of the writ to be used in such case.

But when any property shall be taken, distrained, or attached, which shall be claimed by a *third* person; and the

Mass. Stat. June 25, 1789, act 9, sect. 4. person, thus claiming the same, shall think proper to replevy it; and such property is of the value of more than four pounds, he must in such case, by statute of June 25, 1789, bring his action immediately at the common pleas, in the county where the property is taken, distrained, or at-

Ibid. tached. The form of this writ is also prescribed by statute.

But by a recent statute, Mar. 11, 1808, enlarging the

Mass. Stat. Mar. 11, 1808, sect. 2. jurisdiction of justices of the peace, in civil actions, they may have cognizance of all civil actions, where the damages demanded do not exceed twenty dollars. It is perhaps therefore necessary, that the property replevied should now exceed the value of twenty dollars, instead of four pounds,

in order to entitle the plaintiff to his action at the common pleas.

A trustee process must be brought *immediately* to the common pleas: For of this process a justice of the peace has no jurisdiction: And if, in such action, the plaintiff should not recover a greater sum than twenty dollars damages, he would, by the statute of Mar. 11, 1808, be entitled to no more than one quarter as much in costs.

Trustee process.

Mass. Stat. Feb. 28, 1795, act 9, sect. 1.

1 Mass. T. R. 15.

As to the writ *de homine replegiando*, where the plaintiff stands committed by lawful authority for any crime, for which he may not suffer death, the writ must be returned to the supreme judicial court: but, where the plaintiff is held without order of law, the writ must be returned to the common pleas.

Mass. Stat. Feb. 19, 1787, sect. 1.

Suits, brought in the name of any probate judge, upon a probate bond of any kind, must be originally commenced in the supreme judicial court, held within and for the county unto which the said probate judges respectively belong.

Suits on prob. bonds.

Mass. Stat. Feb. 15, 1787, sect. 3.

III. In what COUNTY actions must be brought.

When the plaintiff and defendant both live within the commonwealth, all *personal* or *transitory* actions must be brought in the county where one of the parties lives; otherwise the writ shall be abated, and the defendant allowed double costs.

Mass. Stat. Oct. 30, 1784, sect. 13.

Where the parties both live within the commonwealth.

Where, however, the inhabitants of one county bring an action, in their corporate capacity, against an inhabitant of another county, the action must not be brought in the county where the plaintiffs reside.

2 Mass. T. R. 544.

As where the inhabitants of the county of Lincoln brought an action against one Prince, an inhabitant of the county of Cumberland; the action was brought at the common pleas in the county of Lincoln; and the defendant filed a plea to the jurisdiction, on the ground that the judges of the court, and all the jurors, being inhabitants of the county of Lincoln, were directly interested in the event of the suit. To this plea there was a demurrer and joinder; but the plea prevailed, and the writ was abated.

Inhabitants of Lincoln v. Prince, 2 Mass. T. R. 544.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c.

3 Bl. Com. 294.

Local actions.

affecting land, the plaintiff must sue in the county in which the land lies.

Actions on penal statutes.

Actions, *grounded on penal statutes*, are *local*, and must be sued in the county in which the offence was committed.

Mass. Stat. June 19, 1788, act 1, sect. 4.

It is enacted by statute, that in all informations to be exhibited, and in all actions and suits to be commenced, against any person or persons, on the behalf of any informer, or on the behalf of the commonwealth and any informer, for or concerning any offence committed against any penal statute, the offence shall be laid, and alleged to have been committed in the county, where such offence was in truth committed, and not elsewhere; and if the defendant, in any such information, action, or suit, pleadeth that he owes nothing, or that he is not guilty, and the plaintiff or informer, in such information, action, or suit, upon evidence to the jury that shall try such issue, shall not both prove the offence laid in the said information, action, or suit, and that the same offence was committed in that county, the issue shall be found for the defendant or defendants.

In actions on penal statutes the offence must be laid in the true county.

The offence must also be proved to have been committed in the true county, otherwise defendant shall be acquitted.

Trustee process.

The trustee process becomes *local* when there is a plurality of trustees, who all dwell in the same county.

Mass. Stat. Feb. 28, 1795, act 9, sect. 1.

It is enacted, that when the trustees, named in the writ, do all dwell in one county, such writ shall be made returnable in the county where all the trustees dwell; but when the trustees do not all dwell in one county, such writ may be made returnable in any county, in which any of the trustees dwell.

Mass. Stat. Mar. 11, 1784, act 3, sect. 1.

Actions before *justices of the peace* must be brought in the county where the defendant dwells; for the authority of this magistrate does not extend to the issuing writs into a foreign county. However, if the defendant, who lives in a foreign county, be found in the county where the justice resides, the writ may be served upon him *there*, and the service will be good.

Actions before justices of the peace.

Mass. Stat. Feb. 26, 1796, act 1, sect. 1.

An action of debt, on a judgment rendered by any court of record, or any justice of the peace of this commonwealth, may be brought in the same court, or before the same justice, where the record remains; or in any court of record, or before any justice of the peace, holding pleas for the county in which either of the parties to such judg-

Actions of debt, on judgment rendered in this commonwealth.

ment, their executors, or administrators, shall dwell and reside, at the time of bringing such action, and proper to try the same.

So also upon a judgment rendered and recorded by a court of record in any other of the United States, or by a court of record of the United States, an action of debt may be brought in any court of record of this commonwealth, holden for the county in which either of the parties to such judgment, their executors, or administrators, shall dwell and reside; or in which any valuable goods, credits, or estate of any debtor in such judgment, shall be found, at the time of bringing such action: Provided, such judgment shall be certified in the form, and to the effect, which is or shall be prescribed by any general law of the congress of the United States.

Mass. Stat. Feb. 26, 1796, act 1, sect. 2.

Actions of debt, on judgment rendered in any other of the United States.

Justifications by officers are sometimes local; in which case they must be sued where their justification is.

5 Bac. Abr. 202. Justifications local.

But in an action against a sheriff for a misfeasance, when the action arises partly from matter of *record*, and partly from matter *in pais*, in different counties, the plaintiff may bring his action in either county, at his election.

Marshall v. Hosmer, 3 Mass. T. R. 23.

IV. At what time actions must be *entered*.

By statute it is enacted, that no action shall be entered at any court of common pleas, after the first day of the sitting thereof. If, however, by any inevitable misfortune or accident, the plaintiff shall be prevented from entering his action upon the first day of the court's sitting, he may, upon making the same appear to the court, enter his action at any time before judgment is given for costs to the defendant.

Mass. Stat. July 3, 1782, act 5, sect. 6.

TITLE VI.

ACTION OF ACCOUNT.

3 Bl. Com. 163.

AN action of *account* lies to compel the defendant to render a just account to the plaintiff, or shew the court good cause to the contrary.

1st. Of the persons *by and against whom* this action will lie.

2d. Of the pleadings.

3d. Of the judgment.

I. Of the persons *by and against whom* this action will lie.

1 Bac. Abr. 17.

An action of account may be brought against a *bailiff* or *receiver;* and *he* is said to be a *bailiff*, who has the charge of lands, goods, or chattels, to make the best benefit for the owner thereof; such person, therefore, is accountable for the profits, which he hath raised or made, deducting his reasonable charges and expences. A *receiver* is one, who has received money or other things for the plaintiff, or to his use.

Cun. Dict. tit. Bailiff.

F. N. B. 117. D.

So also may this action be brought by one partner in trade against his companion.

2 Bl. Com. 194.

Where *one* tenant in common receives more than his proportion of the profits, an action of account will lie against him by the other, and this by the statute of 4 Ann. c. 16, which has been adopted in this commonwealth; for, at common law, no tenant in common was liable to account with his companion.

Sul. Hist. L. T. 173.

2 Bl. Com. 183.

So also, at common law, before the statute of Ann, one joint-tenant might take all the profits, and his partner had no remedy against him, unless he actually appointed him bailiff, or receiver. But now an action of account will lay by one joint-tenant against another.

Sul. Hist. L. T. 170.

This action, by the old common law, lay only against the parties themselves, and not their executors, except the executors of merchants; because matters of account rested solely within their own knowledge. But this defect, after many fruitless attempts in the English parliament, was at last remedied by the statute of 4 Ann. c. 16, which enacts, that actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than his share, and against their executors and administrators.

3 Bl. Com. 164.

1 Bac. Abr. 17.

It appears by the above quoted statute, that an action of account will lay *by*, as well as *against*, executors of joint-tenants and tenants in common.

So also may a *residuary legatee* have an action of account against an executor.

By statute it is enacted, that any executor, being a residuary legatee, may bring an action of account against his co-executor, or executors of the estate of the testator, in his or their hands, and may also sue for and recover his equal and proportionable part thereof; and any other residuary legatee shall have like remedy against the executors.

Mass. Stat. Feb. 6, 1784, sect. 17.

Action by residuary legatee against executors.

So also may one *administrator* have an action of account against his *co-administrator*.

By statute it is enacted, that where two or more have letters of administration granted them of any intestate estate, and one or more of them take all or the greatest part of such estate, into his or their hands, and refuse to pay the debts or funeral charges of such intestate, or refuse to account with the other administrators, then and in such case, it shall and may be lawful for such aggrieved administrator to bring his action of account against the other administrator or administrators, and recover his proportionable share of such intestate's estate, as shall belong or appertain to him.

Mass. Stat. Mar. 9, 1784, act 3, sect. 9.

Action by one administrator against his co-administrator.

II. The pleadings.

The general issue, in this action, is, "*that the defendant never was bailiff of the plaintiff;*"—or "*never was receiver of the plaintiff*, &c."

See Stor. Plead. 71.

1 Selw. Abr. 4.

1 Selw. Abr. 7.

A "*release*," and "*fully accounted*," are usual pleas in *bar* : And if the party is once chargeable and accountable, he cannot plead in bar, except in the case of a "*release*," or "*fully accounted* ;" because a *release*, and having *fully accounted*, are total extinctions of the right of action, which the court is to judge of ; and, even in these two cases, they must be pleaded specially, and cannot be given in evidence on the general issue.

Willoughby v. Small, Browni. Rep. 24.

See Stor. Plead. 72.

So also may surviving partner plead in bar, that he was not bailiff, but that his partner was *sole* bailiff.

Ibid. in notis. cit. 3 Wils. 105. 2 Harr. 302.

So also may defendant plead to part of the time, "*that he was bailiff*," and to the residue "that he was *not* ;" or that, for the residue, he fully accounted.

Southcot v. Rider, Sir T. Raym. 57.

1 Selw. 4.

When the plaintiff charges the defendant as receiver from such a time to such a time, the defendant must answer the whole time precisely.

2 Roll. Abr. 683 (F) pl. 1.

1 Selw. 4.

If the defendant plead that he was never receiver, he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly ; for though this special matter prove, that he is not accountable, yet as, upon the delivery, he was accountable conditionally, (viz. if he did not deliver over,) the evidence does not support the plea.

1 Selw. 5. cit. Harrington v. Deane, Hob. 36.

In account against the defendant, as receiver by the hands of A, it is sufficient for the plaintiff to prove, that A directed the defendant to borrow of another to pay the plaintiff ; that the defendant borrowed accordingly ; and that A gave bond to the lender.

Mass. Stat. Feb. 13, 1787, sect. 1.

The statute of limitations is a good plea in bar to this action. It is enacted, that all actions of account, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced and sued within six years next after the cause of such actions or suits, and not after.

Taylor v. Page, Cro. Car. 116.

1 Selw. Abr. 7.

It is a rule of pleading in account, that a matter, which may and ought to be pleaded in bar, cannot afterwards be pleaded before the auditors ; the reason is, to avoid trouble and charge to the parties ; nor can any thing be pleaded before them, contrary to that which has been pleaded be-

fore in bar, and which has been found by the verdict of a jury. 1 Selw. Abr. 7. cit. 3 Wils. 114.

If defendant plead before the auditors any matter in discharge, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who thereupon will award a *venire facias* to try it; and if, on the trial, the plaintiff make default, he shall be nonsuited; but notwithstanding the nonsuit, he may bring a *scire facias* upon the first judgment. Bull. N. P. 128. 1 Selw. 7.

III. Of the judgment.

In this action, if the plaintiff succeeds, there are two judgments; the first is, "that defendant do account before auditors appointed by the court;" and when such account is finished, then the second judgment is, "that he do pay the plaintiff so much as he is found in arrear." 3 Bl. Com. 163.

It is essential, that the *first* judgment should be entered; for where the defendant pleaded, that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly, and execution taken out; the court, on motion, set aside the judgment, and execution, observing that the judgment was wrong; for it ought to have been only a judgment to account. And they compared the irregularity, in this case, to the irregularity of signing *final* judgment before *interlocutory* judgment. Hughes v. Burgess, Cas. Temp. Hardw. 377. 1 Selw. 5.

A writ of error lies upon the *last* judgment only; but although it be found erroneous, and reversed, the first judgment shall stand in force; for the two judgments are distinct and perfect. Metcalf's Case, 11 Rep. 40. 1 Selw. 7.

By statute it is enacted, that, upon a judgment rendered in any court of common pleas, *that the defendant shall account*, it shall be in the power of the party, against whom such judgment shall hereafter be given, to appeal therefrom, if such party shall think proper, before the same court proceed to the appointment of auditors; and, in case no appeal shall be made from the first judgment that the defendant shall account, an appeal from the final judgment, after the cause has been before auditors, shall not entitle the original defendant to try the issue of *bailiff or not bai-* Mass. Stat. Feb. 17, 1786, act 2, sect. 1.

Appeal lies from the first judgment,—before the appointment of auditors.

But if there be no appeal from the first judgment, an appeal from the final judgment shall not entitle the defendant to try the issue of "bailiff or not bailiff," before the appellate court.

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Mass. Stat. Feb. 17, 1786, act 2, sect. 2.

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Proceedings, in case the defendant neglects to appear before auditors, after the first judgment rendered against him.

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TITLE VII.

ADULTERY.

ADULTERY is the crime of incontinence between persons, one or both of whom are married. This offence is therefore distinguishable into two species—1. *Single* adultery; and, 2. *Double* adultery. If *one* only of the offenders be married, it then comes under the first name; but if *both* be married, it then comes under the last name. Cun; Dict. tit. Adult.

1st. Of adultery, considered as a *criminal* offence; and its punishment by statute.
2d. The ground of the *action* of adultery.
3d. Of the pleadings in such action.
4th. Of the evidence in such action.
5th. Of the damages.
6th. Of the costs.

I. Of adultery, considered as a *criminal* offence; and its punishment by statute.

In England, the temporal courts take no notice of this offence, otherwise than as a *civil* injury. In a criminal view, adultery is there considered as affecting religion, rather than society; and, for that reason, is left to the coercion of the spiritual tribunal. The elegant author of the Commentaries complains of the great tenderness and lenity with which this, and other offences of the same class, are treated in his country, by the canon law, upon which the ecclesiastical magistrate proceeds. And this extreme mildness he ascribes to the constrained celibacy of its first compilers. 4 Bl. Com. 65. Ibid. Ibid.

But, in this state, this offence is considered injurious, not only to religion, and the happiness and honour of individuals, but also to society, and is therefore punished as such.

Mass. Stat. Feb. 17, 1785, sect. 1.

Punishment of adultery by statute.

By statute is is enacted, that if any man or woman shall commit adultery, and be thereof convicted, every person so convicted shall be set upon the gallows, with a rope about his or her neck, and the other end of it cast over the gallows, for the space of one hour; be publicly whipped, not exceeding thirty-nine stripes; be imprisoned or fined, and bound to the good behaviour; all, or any of these punishments, according to the aggravation of the offence.

II. The ground of the action of adultery.

1 Esp. Dig. 430.

The ground of this action is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company, and that of her children, and imposing on him a spurious issue.

Duberly v. Gunning, 4 T. R. 651.

1 Selw. 10.

If it can be proved, that the husband consented to, or provided means for, the adulterous intercourse of his wife, with the defendant, the ground of the action is removed, and the defendant will be entitled to a verdict; for *volenti non fit injuria.*

Wyndham v. Wycombe, 4 Esp. N.P.C. 16.

1 Selw. 11.

So if the husband after marriage, transgresses all those rules of conduct, which decency requires, and affection demands from him, and in an open, notorious, and undisguised manner, carries on a criminal correspondence with other women, he cannot maintain this action.*

Bull. N. P. 27.

1 Selw. 11.

So if the wife be suffered to live as a prostitute, with the privity of the husband, and the defendant has thereby been drawn in to commit the act, of which the husband complains, the action cannot be maintained.

Duberly v. Gunning, 4 T. R. 651.

1 Selw. 11.

But if the husband has not proceeded thus far, yet if he has been guilty of negligence or inattention to the behaviour and conduct of his wife with the defendant, not amounting to a consent; such circumstance, though it will not bar the action, will go in mitigation of damages.

5 T. R. 357.

In general, no action for *crim. con.* can be brought, for any act of adultery, after a *separation* between husband and wife.

Weedon v. Timbrell, 5 T. R. 357. 1 Selw. 11.

As where, in an action for adultery with the plaintiff's wife, it appeared, that the plaintiff and his wife had agreed

* See the case of Bromley v. Wallace, 4 Esp. Rep. 237, where it is laid down, by lord Alvanley, that such conduct goes only to the *damages*, and not to the *action*.

to live separately; the plaintiff proved several acts of adultery, committed by the defendant, *after* the separation of the plaintiff and his wife, but there was not any direct proof of adultery *before* the separation. Lord Kenyon, Ch. J., being of opinion, that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice.

But, in a recent case, where the husband and wife had entered into a deed of separation, with trustees, and the wife was living separate from her husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse; it was decided, that this action would lie; for this was not such a separation as the husband consented to by the deed, and therefore the husband had not given up all claim to the comfort, society, and assistance of his wife.

Chambers v. Caulfield, 6 East's Rep. 244.

III. Of the pleadings, in such action.

The declaration in this case states the offence, by making an assault on the wife, &c.

1 Esp. Dig. 434.

The general issue in this action is, *not guilty*.

The statute of limitations is also a good plea; in which the plaintiff must allege, "*that he is not guilty within six years;*" for although, in actions of assault, the time of limitation is three years, yet the gist of this action is the criminal conversation; it being declared on, *as case*, for the criminal conversation.

Mass. Stat. Feb. 13, 1787, sect. 1.

1 Esp. Dig. 434.

This action is therefore brought in the name of the husband only; because the gist of the action is not the assault on the person of the wife, but the injury sustained by the husband, in consequence of the adultery.

Macfadzen v. Olivant, 6 East's Rep. 388.

1 Selw. 9.

IV. Of the evidence in such action.

Plaintiff must bring proof of the actual solemnization of a marriage, nothing shall supply its place; cohabitation or reputation are not sufficient, nor any collateral proof whatever.

1 Esp. Dig. 430.

Morris v. Miller, 4 Burr. 2057.

1 Esp. Dig. 430.

As where plaintiff, in this case, proved articles made after marriage with his wife, for the settling of the wife's estate, with the privity of the relations on both sides; and also proved cohabitation, name, and reputation; he proved further, that the defendant had confessed that he had committed adultery with the plaintiff's wife, which, it was contended, was an admission of the marriage; but the plaintiff was nonsuited for want of proof of a marriage in *fact*.

Bull. N. P. 27.

1 Esp. Dig. 431.

The marriage may be proved, either by a copy of the record of such marriage, or by the testimony of one who was present at the ceremony.

Bull. N. P. 28.

Mass. Stat. June 22, 1786, sect. 8.

It is sufficient, if the plaintiff be of any religious sect, to prove a marriage according to the rites and ceremonies of that sect; as Jews, Quakers, &c.

Bull. N. P. 28.

1 Esp. Dig. 431.

The confession of the wife will be no proof against the defendant, but a discourse between her and the defendant may be proved. So letters written to her by the defendant may be read as evidence against him, though her letters to him will be no evidence for him.

Edwards v. Crock, 4 Esp. Rep. 39.

1 Selw. 17.

In a recent case, where the plaintiff and his wife were servants, and necessarily living apart in different families, Lord Kenyon, Ch. J., was of opinion, that letters written by the wife to the husband, before any suspicion of the adultery, might be read as evidence of the connubial affection which subsisted between the plaintiff and his wife, observing at the same time, that, before he admitted the letters to be read, he should require strict proof when, and under what circumstances, they were written, in order to shew that, at the time, there was not any suspicion of misconduct in the wife.

V. Of the damages.

Circumstances in aggravation of damages.

Bull. N. P. 27.

1 Esp. Dig. 432.

The injury, in the case of adultery, being great, the damages are generally considerable; but they depend upon circumstances, that is, they are increased or diminished from the consideration of the rank and quality of the plaintiff; so, from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependant of the plaintiff; so, if it appeared that the plaintiff and his wife

lived happily before that transaction and acquaintance with the defendant; so, that the wife had always borne a good character till then; so, that there was a settlement and provision for the children of the marriage: All these circumstances go in aggravation of the damages, in which, also, the circumstances and property of the defendant are always considered.

Circumstances in mitigation of damages.

On the other hand, many circumstances go in extenuation of the offence, and mitigation of damages: Such as the plaintiff's ill usage or unkind treatment of his wife, of his intolerable ill temper, of his having turned his wife out of his house, and refused to maintain her, &c. previously to the adulterous intercourse; gross negligence, or inattention of the plaintiff to his wife's conduct, with respect to the defendant; the wanton manners of the wife, or first advances made by her to the defendant; a prior elopement of the wife, and criminal correspondence with another person, or having had a bastard before marriage; letters written by the wife to the defendant before his connexion with her, soliciting a criminal intercourse, &c. But the defendant will not be permitted to prove acts of misconduct of the wife, subsequent to the commission of the act complained of in the action.

1 Selw. Abr. 18.

4 T. R. 657.

Gardiner v. Jadis, Mar. 2, 1805, London Sittings. Bull. N. P. 27.

Elsam v. Fawcett, 2 Esp. Rep. 562.

1 Selw. 18.

It has been supposed, that, in this action, a new trial cannot be granted for excessive damages; but in the case of Chambers v. Caulfield, 6 East's Rep. 256, Lord Ellenborough, Ch. J., in delivering the opinion of the court, said, that if it appeared to them from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives, or some gross error or misconception on the subject, they should think it their duty to submit the question to the consideration of a second jury.

1 Selw. 19.

VI. Of the costs.

By statute it is enacted, that no action shall be sustained in any court of common pleas, where the damage demanded does not exceed twenty dollars, unless by appeal from

Mass. Stat. March 11, 1808, sect. 2.

a justice of the peace, saving such actions wherein the title to real estate is concerned; and if, upon any action originally brought before the court of common pleas, judgment shall be recovered for no more than twenty dollars, debt or damage; in all such cases, the plaintiff shall be entitled, for his costs, to no more than one quarter part of the debt or damage so recovered.

TITLE VIII.

ADVANCEMENT.

By statute it is enacted, that any deed of lands or tenements, made for love and affection, or where any personal estate delivered a child shall be charged, in writing, by the intestate, or by his order, or a memorandum made thereof, or delivered expressly for that purpose, before two witnesses, who were bid to take notice thereof; the same shall be deemed and taken, an advancement to such child or children, to the value of such lands, tenements, or personal estate. Mass. Stat. March 9, 1784, act 3, sect. 7.

In the case of Scott, and others, v. Scott, which was an appeal from a decree of the judge of probate, the appellants claimed to have the value of a piece of land, conveyed from the ancestor to his son, considered in the apportionment of the ancestor's estate, as an advancement by him to his son; because his deed appeared to have been made for the consideration of *love and affection*. And the appellants grounded their claim on the provision in the statute above quoted. But it appearing that the deed, besides the consideration of *love and affection*, expressed the further consideration of *five shillings*, the court held, that said further consideration of five shillings was of sufficient value to remove all presumption of an advancement in this case, and the decree was consequently affirmed. Scott & al. v. Scott, 1 Mass. T. R. 527.

And now, by a subsequent act, it is provided, that all gifts or grants, made by the intestate, to any child or grand-child, of any estate real or personal, in advancement of the portion of such child or grand-child, and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing, or acknowledged in writing, by the child or grand-child, as made for such advancement; such estate, real or personal, shall be taken and estimated Mass. Stat. Mar. 12, 1806, act 1, sect. 3.

in the distribution and partition of the intestate's real and personal estate, as part of the same; and the estate, so advanced, shall be taken by such child or grand-child, towards his share of the intestate's estate. And the value, at which such estate shall be so taken, shall be the same as above expressed, or charged by the intestate, or acknowledged by the child or grand-child, if any value be so expressed, charged, or acknowledged; otherwise, at the value thereof, when given.

To make a gift operate as an advancement, the statute of 1806, above quoted, makes it necessary either, 1. that it be so expressed in such gift; or, 2. that it be so charged by the intestate in writing; or, 3. that it be so acknowledged in writing by the child, whose interest will be thereby so materially affected.

TITLE IX.

ALIEN.

An alien is one born without the limits of the United States, and owing allegiance to a foreign country. Aliens are distinguished into alien *friends* and alien *enemies*. An alien friend is one whose country is at *peace* with us: An alien enemy is one whose country is at *war* with us.

1st. Of the nature of allegiance.
2d. Who are aliens.
3d. Of the incapacities of aliens.
4th. Of naturalization.

I. Of the nature of allegiance.

Allegiance is the tie or *ligamen* which binds the citizen to the state, in return for that protection which he receives from the government of that state. 1 Bl. Com. 366.

Allegiance is either express or implied. Express allegiance is where a subject of the state has taken that oath of fidelity to the government, which is prescribed by law. This constitutes a public declaration of allegiance to government, and is a confirmation of natural duty. This express allegiance, derived to us from the oath of fealty, adopted in the feudal system, is materially varied from it, and, instead of being a badge of slavery and vassalage, is an honourable acknowledgment of subjection to legal government. Ibid. 368. 1 Swif. Syst. L. C. 163.

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every citizen to his country, antecedently to any express promise, and although the citizen never swore any faith or allegiance in form. The *formal profession* of allegiance is therefore nothing more than a declaration, in words, of what was before implied in law: 1 Bl. Com. 368.

2 Inst. 121. Which occasions Sir Edward Coke to remark, that "all subjects are equally bound to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction

1 Bl. Com. 369. of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not increase the civil obligation of fidelity to government. It only strengthens the *social* tie, by uniting it with that of *religion*.

Ibid. Allegiance, both express and implied, is again distinguished into two sorts, or species; the one *natural*, the other *local*: the former being also *perpetual*, the latter *temporary*.

Ibid. Natural allegiance is such as is due from all men to their native country; for, immediately upon their birth, they are under the protection of government; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstances. It is

1 Swif. Syst. 164. therefore a settled doctrine, that, let a man remove himself into whatever country he pleases, he continues to owe allegiance to his native country, and is punishable for high treason for joining its enemies, and levying war upon it.*

1 Bl. Com. 370. Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the state or country, and receives the protection of the government thereof: And it ceases the instant such stranger transfers himself from this country to another.

Ibid. Natural allegiance is therefore perpetual, whereas local allegiance is temporary, only: And for this reason, evidently founded on the nature of government; that allegiance is a debt due from the citizen, upon an implied contract with the government, that so long as the one affords

* See the remarks of Judge Tucker, in which this doctrine is called in question, so far as it respects the United States. Tuck. Black. vol. i. p. 1. note K. append. See also REMARKS, CRITICAL and MISCELLANEOUS, on Blackstone's Commentaries, by James Sedgwick, chap. 12, p. 239.

protection, so long the other will demean himself faithfully. As therefore the government is always under a constant tie to protect the native citizen, at all times, and in all countries, for this reason the allegiance, due from him, is equally universal and permanent. But, on the other hand, as our government affords its protection to an alien, only during his residence here, the allegiance of an alien is therefore confined to the duration of such his residence.

1 Bl. Com. 370.

II. Who are aliens.

We have already defined an alien to be one born without the limits of the United States, and owing allegiance to a foreign country. To a precise understanding of this part of our subject, a variety of considerations are necessary; and the definition, which we have given of an alien, must be understood with some restrictions.*

Thus, the children of ambassadors born abroad were always held to be natural subjects. It may likewise be useful here to notice an English statute 7 Ann. cap. 5. sect. 3, which enacts, that the children of all natural born subjects, born out of the ligeance of her majesty, her heirs, and successors, shall be deemed, judged, and taken to be natural born subjects, to all intents, constructions, and purposes whatsoever.

Ibid. 373.

1 Bac. Abr. 78.

In regard to this subject, there are many useful principles, which grew out of American independence, and the treaty of peace with Great-Britain.

Thus, in the heat of our revolutionary conflict, our legislature enacted a statute, entitled, "*An act for confiscating the estates of certain persons, commonly called absentees.*"

The first section of this statute enacts, that every inhabitant and member of the late province, now state of Massachusetts-Bay, or of any other of the late provinces or colonies, now United States of America, who, since the 19th of April, 1775, had levied war, or conspired to levy war against the government and people of any of the said colonies or provinces, or United States; or who hath adhered

Absentee act, April 30, 1779, act 2, sect. 1.

See Appendix to the Statute Laws, Th. Ed. v. 3. New Ed. v. 2.

* See Tucker's Blackstone, vol. i. part 2, append. note L. page 98.

to the said king of Great-Britain, his fleet, or armies, enemies of the said provinces or colonies, or United States; or hath given to them aid or comfort; or who, since the said 19th of April, 1775, hath withdrawn, without the permission of the legislative or executive authority of this or some other of the said United States, from any of the said provinces or colonies, or United States, into parts or places under the acknowledged authority and dominion of the said king of Great-Britain, or into any parts or places within the limits of any of the said provinces, colonies, or United States; being in the actual possession, and under the power of the fleets or armies of the said king; or who, before the said 19th of April, 1775, and after the arrival of Thomas Gage, esq. (late commander in chief of all his Britannic Majesty's forces in North-America) at Boston, the metropolis of this state, did withdraw from their usual places of habitation, within this state, into the said town of Boston, with an intention to seek and obtain the protection of the said Thomas Gage, and of the said forces, then and there being under his command; and who hath died in any of the said parts or places, or hath not returned into some one of the said United States, and been received as a subject thereof, and, if required, taken an oath of allegiance to such states; shall be held, taken, deemed, and adjudged to have freely renounced all civil and political relation to each and every of the said United States, and be considered as an *alien.*

Sect. 2. The second section declares the property of such person to escheat and enure to the government.

Sect. 3. The third section provides process, in the nature of an inquest of office, in order to recover the property.

2 Mass. T. R. 236. It has been decided, that this statute cannot operate, *ipso facto*, to disfranchise a citizen, and make him an alien;

Construction of the absentee act. but that, to produce such effect, a trial and conviction must have been had under it.

Kilham v. Ward & al. 2 Mass. T. R. 236. As where one Kilham brought an action against one Ward and al., selectmen of the town of Salem, for refusing his vote at a meeting for the choice of representatives. The ground of defence was, that plaintiff was an alien; and the absentee act, above quoted, was produced against him.

But the court held, that the act ought not to avail against Kilham, because it was not proved at the trial, that he was, at any time, prosecuted and convicted, upon the said act, for any crime or offence by him committed against the same.

Neither does our law deem any native inhabitant of this state an alien, who, after the commencement of the revolutionary war, left this country, and resided in the territories of the enemy; provided, he returned to the United States, and took up a permanent residence therein, antecedent to the *treaty of peace*.

Gardner's Case, 2 Mass. T. R. 244.

For the definitive treaty established, in a legal sense, the distinct sovereignty of the United States, and their separation from the other dominions of the king of Great-Britain. His Britannic majesty thereby acknowledged the United States, formerly the British colonies, to be free, sovereign, and independent; and relinquished all claims to the government, and proprietory and territorial rights of the same; and the peace, thereby established, was declared to be between the citizens of the one, and the subjects of the other. This relinquishment, on the part of Great-Britain, and the acceptance of it, on the part of the people of the United States, determined their respective claims of allegiance and citizenship. By this compact and event, those natives of the British dominions, who were then settled within, and under the protection of the United States, not being excluded or disqualified, nominally or judicially, by the effect of any special statute or regulation, within any state, became citizens of the United States, and aliens to their former sovereign; while those who continued settled within the territories of their former sovereign, and under his protection, adhering to their former allegiance, are, by the same compact, aliens from the new sovereignty recognized by the treaty.

Same Case, Per Sewall, J.

Construction of the treaty of peace with G. B.

Therefore, where a native of Massachusetts left this country, after the commencement of hostilities with Great-Britain, in 1775, and continued with the British until after the treaty of peace, it was decided, that such person was an alien.

Palmer & Ux. v. Downer, 2 Mass. T. R. 179.

III. Of the incapacities of aliens.

An alien cannot derive a title to real estate, either by inheritance or purchase; because it would be the wildest impolicy, in any country, to suffer strangers to hold, within its territory, a property more permanent than the allegiance which they owe to it. Allegiance and protection are correlatives: Inasmuch, therefore, as an alien owes only a local and temporary allegiance here, the law gives both his person and property a protection, only commensurate with that allegiance.

1 Bl. Com. 372.

1 Bac. Abr. 80.

Notwithstanding, however, this general principle, an alien may purchase lands, even in fee simple, but he cannot hold them after *office found*, for that moment they become vested in the commonwealth: But *before* office found, he may hold them against all, except the commonwealth.*

1 Mass. T. R. 256.

1 Bac. Abr. 81.

Therefore, where one O'Neil, an alien, conveyed a certain tract of land to one Sheaffe, in fee and in mortgage,

Sheaffe v. O'Neil, 1 Mass. T. R. 256.

* The Compiler was favoured with the following valuable note, by a gentleman of professional eminence, in the county of Worcester.

In the action *Moore & al.* v. *Patch*, tried at the supreme judicial court, Worcester, April term, 1808; Judge Sedgwick declared the opinion of the *whole* court, on a question, which had been submitted at a previous term. The cause had heen argued at Boston, on a statement of facts, which was afterwards discharged, on account of the omission of a material fact, and it was now decided by a jury. The court had, however, made up their opinion, on the principal question of law, involved in the case, and it was accordingly pronounced by Judge Sedgwick on the trial.

The demandants had brought an action to recover seizin and possession of a tract of land in Worcester, declaring on the seizin of David Moore, their ancestor, and a disseizin by the defendant. David Moore had entered upon the land, under a deed from James Putnam, esquire, an absentee, who had left the country during the war, and ever afterwards resided within the British dominions, and was therefore an alien. After the treaty of peace, he had commenced an action against Patch, the defendant, as executor of the last will of one Nathaniel Adams, to recover a debt which had been contracted, by Adams, *before the war*. Judgment was rendered, by default, in favour of Putnam, against the goods and estate of Adams, in the hands and possession of Patch, his executor; and execution was extended upon the land in dispute. Patch ne-

Sheaffe brought an action for the recovery of the land, and the defendant pleaded alienage of O'Neil in bar of the action: To this plea there was a general demurrer, upon which the court were unanimously of opinion, that the plea in bar was bad.†

But though an alien cannot hold real estate, yet, if he be an alien *friend*, he may hold personal estate. Such one 1 Bac. Abr. 83.

glected to redeem; afterwards accepted a parol lease from the attorney of Putnam, and agreed to pay rent. At the expiration of the term, he refused to quit the premises, and having obtained a quit-claim from the heirs of Adams, had ever since remained in possession. During the continuance of the lease, Putnam conveyed, by quit-claim, to David Moore, the ancestor of the demandants, who now brought their action for the recovery of the land.

The principal question, arising in the trial, was, whether a British subject could take land within the commonwealth, by execution, in satisfaction of a debt, contracted before the treaty of peace; and, being so seized, could convey, by deed, an absolute title to a citizen of the commonwealth. This question was decided in the affirmative, as was understood, by the *unanimous* opinion of the court. The fourth article of the definitive treaty of peace having provided, "that creditors, on either side, should meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, heretofore contracted," it was determined, that, to give complete effect to this provision, it was necessary, a British creditor should be put on the same footing (as respects the means of recovering judgment and payment of his debts) with the citizens of the commonwealth; and might, therefore, extend his execution on the land of his debtor, in satisfaction of a judgment for a *bona fide* debt, contracted before the peace. Under this direction of the court, a verdict was given in favour of the demandants.

† By 9th art. of the treaty of Amity, Commerce, and Navigation, with Great-Britain, it is agreed, that British subjects, who now hold lands in territories of the United States, and American citizens, who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives, and that neither they, nor their heirs, or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens.

Mass. Stat. Mar. 12, 1806, act 1, sect. 4.

may also bring and defend personal actions; and may come in under our statute of distributions, and take his dividend of the intestate's personal estate.

Palmer & Ux. v. Downer, 2 Mass. T. R. 179.

So also, though an *alien* cannot *inherit* real estate, yet a natural born citizen may make his title, by descent, through an alien ancestor; and this by virtue of an English statute, 11 & 12 W. III. cap. 6, which has been adopted in this state.

1 Bac. Abr. 81.

This statute provides, that all persons, being natural born subjects of the king, may inherit and make their titles by descent, from any of their ancestors, lineal or collateral, although their father, mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance, as fully as if such father, mother, or other ancestor, had been naturalized, or natural born subjects.

Co. Lit. 129. b.

1 Bac. Abr. 84.

An alien *enemy* cannot generally bring even a *personal* action. This rule, however, must be understood restrictively; for if an alien enemy comes hither *under safe conduct*, he may maintain a personal action.

Ld. Raym. 282.

1 Bac. Abr. 84.

So also, if an alien friend comes hither in time of peace, and lives here, *under protection*, and a war afterwards happens between the two nations, he may maintain an action; for suing is but a consequential right of protection.

IV. Of naturalization.

Art. 1, sect. 8.

It is provided by the constitution of the United States, that congress shall have power to establish an uniform rule of naturalization throughout the United States.*

See Appendix, No. 1.

In pursuance of this authority, congress have enacted two statutes on this subject, both of which are in force. One of these statutes was passed April 14, 1802, and repeals all former laws on that subject; the other is a supplementary act, and was passed March 26, 1804. Both of these statutes may be seen at large, by referring to the appendix.

* See Tucker's Blackstone, vol. i. part 2, page 374. Note 12. Ibid. Append. Note L. page 98.

TITLE X.

APPEAL.

AN appeal is the removal of a cause from an inferior, to a superior court. Cun. Dict.

1st. In what cases an appeal *does*, and in what cases it does *not*, lie.

2d. The previous conditions necessary to be performed by the appellant, in order to entitle him to an appeal.

3d. At what time an appeal must be entered.

4th. The effect of an appeal.

I. In what cases an appeal *does*, and in what cases it does *not*, lie.

1. An appeal lies from a decree of the judge of probate to the supreme judicial court, which is the supreme court of probate. By statute it is declared, that any person, aggrieved at any order, sentence, decree, or denial of any judge of probate, in any county within this commonwealth, may appeal therefrom to the supreme court of probate. Mass. Stat. Mar. 12, 1784, act 4, sect. 4.

2. Generally, an appeal lies from the judgment of a justice of the peace, to the common pleas; and from a judgment of the common pleas, to the supreme court. Mass. Stat. Mar. 11, 1784, act 3, sect. 6. Mass. Stat. July 3, 1782, act 5, sect. 2.

But, to this rule, there are exceptions: Thus,

1. An appeal from a justice of the peace does not lie, for either party, in a prosecution on the militia acts. Mass. Stat. Mar. 4, 1800, act 5, sect. 16.

2. Neither does an appeal lie from the justices, in the process of *forcible entry and detainer*. Mass. Stat. June 30, 1784, act 1, sect. 3.

3. No appeal lies from the common pleas, for either party, in a prosecution on the act "*for the maintenance of bastard children.*" Mass. Stat. Mar. 15, 1786, sect. 2.

4. No appeal lies from a judgment of the common pleas, rendered on the report of referees, where it is agreed, that the report shall be final. Mass. Stat. Mar. 3, 1792, act 3.

Mass. Stat. Mar. 9, 1804, act 18, sect. 5.

5. No appeal lies from the judgment of the common pleas, in any action founded on simple contract, wherein it shall appear, that the demand of the plaintiff does not exceed *fifty* dollars: And furthermore, by statute, whenever, in any action founded on simple contract, the plaintiff shall demand more than *fifty* dollars, and shall not, by the judgment of the supreme judicial court, on the appeal thereof, recover a larger sum than fifty dollars, the defendant shall recover his legal costs arising in such action, after the appeal thereof, unless such appeal was made by the defendant; in which case, the plaintiff shall be entitled to and recover double costs, after the making such appeal.

Ibid. Also Mar. 11, 1784, act 3, sect. 6.

6. No appeal lies from a judgment rendered on default, either by the common pleas, or a justice of the peace.

Bemis v. Faxon, 2 Mass. T. R. 141.

7. But if a verdict be rendered by the court of common pleas, and judgment be arrested, an appeal will nevertheless lie; for otherwise, the common pleas might oust the supreme court of its appellate jurisdiction.

The right of appeal is derived from statute.

8. By the fifteenth article of the bill of rights, it is declared, that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

Mountfort v. Hall, 1 Mass. T. R. 443.

From the provision, contained in the above article of the bill of rights, some have imagined, that, should the legislature give original and exclusive jurisdiction to a justice of the peace, in any case where the party has a right to a trial by jury, an appeal might nevertheless be sustained by the common pleas, because a justice has no power to summon a jury: But it is now settled, that in such case, an appeal would *not* lie, because the common pleas derives its appellate jurisdiction from *statute*; the constitution not giving the right of appeal in any case.

Penniman v. French, 2 Mass. T. R. 140.

9. An uncle and next friend of a *non compos* cannot, as such, sustain an appeal from the probate court against the guardian, without shewing himself to be heir or creditor;

for, without shewing this, it does not appear that he is aggrieved by the decree appealed from: And the office of guardian to a *non compos* is a very irksome one, and ought not to be made more so by vexatious appeals.

II. The previous conditions necessary to be performed by the appellant, in order to entitle him to an appeal.

At what time an appeal must be claimed.

If an appeal be claimed from the common pleas, it must be done before the expiration of the term at which judgment is rendered; and if from a justice of the peace, it must be claimed before the court has completed its business, and before the adverse party has departed therefrom.

Mass. Stat. Mar. 11, 1784, act 3, sect. 6.

Mass. Stat. Mar. 9, 1804, act 18, sect. 5.

To entitle the party to an appeal, there must be an issue tendered and joined in the action: For an appeal does not lie from a judgment rendered on default.

Mass. Stat. June 18, 1788, act 7, sec. 2 & 3.

Mass. Stat. June 18, 1791, act 6, sect. 5.

If, however, a default or nonsuit be occasioned by accident, mistake, or any unforeseen cause, or any appeal be prevented or lost to the hindrance or subversion of justice, the aggrieved party may have the action reviewed by petition to the court having appellate jurisdiction.

Mass. Stat. July 3, 1782, act 5, sect. 2.

Mass. Stat. Mar. 11, 1784, act 3, sect. 6.

Before an appeal can be granted, either by the common pleas, or a justice of the peace, the appellant must recognize to the adverse party, with sufficient surety or sureties, to prosecute his appeal with effect, and to pay all intervening damages and costs. On an appeal from a justice of the peace, the amount of this recognizance is limited to *ten* pounds.

Mountfort v. Hall, 1 Mass. T. R. 443.

Duty of appellant, when the court refuses to grant an appeal.

If either of these courts refuse to grant an appeal, when thus claimed, it will be best for the appellant to produce his sureties, and make an *offer* to recognize, and also to tender the legal fees for taking such recognizance. Having taken this precaution, the appellant may safely enter his appeal at the proper court, which will, of course, sustain it, if it have appellate jurisdiction, notwithstanding the refusal of the court below.

Appeals from a judge of probate.

Thus much for appeals from the common pleas and justices of the peace. Appeals from an order, decree, &c. of the judge of probate are governed by different regulations.

Mass. Stat. Mar. 12. 1784, act 4, sect. 4.

1. Thus, first; the appeal must be claimed within one month from the time of making such order, decree, &c.

Mass. Stat. March 12, 1784, act 4, sect. 4.

2. The appellant must, within ten days after such appeal shall be claimed and granted, give bonds, and file the same in the probate office, for prosecuting the appeal with effect, at the next supreme court of probate, and for paying all intervening costs and damages, and such costs as the supreme court of probate shall tax against him.

Ibid.

3. The appellant must file the reasons of appealing, in the probate court appealed from, within ten days after the security is given, and must serve the adverse party or parties with an attested copy of such reasons, fourteen days at least before the sitting of the said supreme court of probate, at which the trial is to be had.

Ibid.

4. The statute, however, makes this *proviso*, that any person beyond sea, or out of the United States, who shall have no sufficient attorney within the government, at the time of such order, sentence, decree, or denial, shall have one month after his or her return, or constitution of such attorney, to claim and prosecute an appeal.

M'Donald v. Morton & al. 1 Mass. T. R. 543.

It has also been decided, that where one, who had been put under guardianship, as *non compos*, applied to the judge of probate for a revocation of the letters of guardianship; and appealed from the decree of the judge thereupon; that, in such case, it was not necessary for the appellant to give bonds to prosecute the appeal: For his case is not within the reason of the statute. The statute requires bonds to secure the payment of the costs, to which the appellee will be entitled, in consequence of a decision against the appellant. Now, in this case, either the letters of guardianship must be repealed, and, in that case, the appellee entitled to no costs, and the bond, of course, wholly unnecessary; or the guardianship will be confirmed by the dismissal of the petition, and *that*, because the appellant is proved to be *non compos mentis*; and, in such case, his contracts in general, and, of course, such bond, would be void. To this it may be added, that the whole estate of the appellant is in the hands of the appellees, and they will, if their guardianship continue, be able to pay themselves.

Same Case, Per Sedgwick, J.

III. At what time an appeal must be entered.

Appeals must be entered at the appellate court, at the term immediately succeeding the appeal claimed; and this the appellant undertakes to do by the condition of his recognizance. Mass. Stat. July 3, 1782, act 5, sect. 2. Mass. Stat. Mar. 11, 1784, act 3, sect. 6.

If, however, the omission to enter the appeal, at the proper term, be the result of any mistake, accident, or unforeseen cause, the appellant may, by petition to the appellate court, be permitted to enter the same; provided application for that purpose be made within one year from the time the appeal ought regularly to have been entered. Mass. Stat. June 18, 1791, act 6, sect. 1, 2, & 5.

It has however been decided, that the provision of the statute, last quoted, does not extend to appeals from a judge of probate. Such appeals must therefore be entered at the regular term, or they will not be sustained. Dean v. Dean, 2 Mass. T. R. 150.

If the appellant neglect to enter his appeal at the regular term, it is the duty of the appellee, in the course of the same term, to enter his complaint, in which he must set forth the judgment, the appeal from it, and the omission of the appellant to enter his appeal; and must therein pray that said judgment be affirmed, with the additional costs and damages that have since intervened. This complaint must be accompanied by an authenticated copy of the whole case, upon the inspection of which, the court will affirm the judgment accordingly. Mass. Stat. July 3, 1782, act 5, sect. 3. Mass. Stat. Mar. 11, 1784, act 3, sect. 6.

If, however, by reason of any accident, mistake, or unforeseen cause, the appellee should omit to enter his complaint at the regular term, he may nevertheless by petition to the appellate court, within one year afterwards, be permitted to enter the same. Mass. Stat. June 18, 1791, act 6, sect. 1, 2, & 5.

In a petition to enter an appeal or complaint, which ought regularly to have been entered at a former term, the *accident* or *mistake*, which hindered the entry at the proper term, ought to be stated in the petition, that the court may see whether the facts relied on are sufficient ground for the interference of the court. And as the statute has not defined or described what *is* an *accident*, *mistake*, &c. it is left for the court, in their discretion, to determine. Jackson v. Goddard, 1 Mass. T. R. 230.

IV. The effect of an appeal.

By an appeal, the party may be again fully heard upon the issue, on which he relies for the successful event of his cause. It is therefore necessary, and indeed the law enjoins it upon him, to furnish the appellate court with a complete transcript of the whole case, duly authenticated by the court appealed from. And here, too, the appellate court has a discretionary power to allow him to put in an additional plea, if the same be necessary for the furtherance of justice.

Mass. Stat. July 3, 1782, act 5, sect 3.

Mass. Stat. March 11, 1784, act 3, sect. 6.

This latitude of privilege is not, however, allowable in all cases. In actions, where, from their nature, there are *two* judgments, it is advisable to appeal from the *interlocutory* judgment, before the rendition of *final* judgment.

Thus, in the case of petition for partition, it is provided by statute, that either party may appeal from the judgment of the court of common pleas, *that partition shall be made*, to the supreme judicial court, *before the appointment of freeholders* to make partition. But if no appeal be made until *after the return of the freeholders*, and the judgment of the court thereon, the judgment, *that partition shall be made*, shall not, by such appeal, be again called in question. And the supreme judicial court shall, upon the complaint of the appellee, (in case the appellant shall fail to enter or prosecute his appeal) affirm the former judgment, and cause such other proceedings to be had thereon, as to have partition completed in the same way and manner, as if the proceedings had been originally commenced in that court.

Mass. Stat. Feb. 14, 1787, act 1, sect. 2.

In petition for partition, if defendant omits to appeal from the first judgment, he cannot, on appeal from the final judgment, draw into question the first judgment.

Upon failure of the appellant to prosecute his appeal, judgment may be affirmed on complaint.

The statute has made the same provisions in cases of *actions* of partition.

Sect. 3.

So also, in cases of actions of *account*, it is provided by statute, that upon a judgment rendered in any court of common pleas, *that the defendant shall account*, it shall be in the power of the party, against whom such judgment shall be given, to appeal therefrom, if such party shall think proper, *before the same court proceed to the appointment of auditors*; and, in case no appeal shall be made from the *first* judgment, *that defendant shall account*, an appeal from the final judgment, after the cause has been before auditors, shall not entitle the original defendant to try the issue of *bailiff, or not bailiff*, before the supreme judicial court; but the first judgment, *that defendant shall account*,

Mass. Stat. Feb. 17, 1786, act 2, sect. 1.

In an action of account, if defendant omits to appeal from the first judgment, he cannot, on appeal from the final judgment, draw into question the propriety of the first judgment.

shall remain in full force, and he shall account accordingly. And in case the defendant shall not enter and prosecute his appeal from the *first* judgment, the same, upon complaint, may be affirmed; and auditors may thereupon be appointed in the same manner they would have been in the court of common pleas, had no appeal been made from the first judgment.

Upon failure of the defendant to enter his appeal, judgment may be affirmed on complaint.

Whenever there shall be an appeal from a judge of probate, and the appellant shall file the reasons of appeal, and give bonds, and notify the adverse party, according to law; in that case, all further proceedings, in consequence of the order or decree appealed from, shall be stayed until a final determination shall be had thereon in the supreme court of probate.

Mass. Stat. Mar. 12, 1784, act 4, sect. 5.

So also in appeals from a judge of probate, when it shall appear, from the reasons of appeal, that the sanity of the testator, or the attestation of the witnesses in his presence, as the law directs, is the question in controversy, on any will or codicil, the supreme court of probate may, for the determination thereof, direct a real or feigned issue to be tried before a jury in the same court, at the expense of the appellant, in case the issue be found against him. And in case the party or parties appealing, fail in the prosecution of the said appeal to effect, then the adverse party, or any person interested in the sentence or decree, so appealed from, shall have the benefit of the same, by filing a complaint before the supreme court of probate, in like manner as is provided by law for affirming the judgment of the court of common pleas in the supreme judicial court. And the supreme court of probate may assess reasonable costs, in all cases that may be brought before them; and in case the appellant shall neglect or refuse to pay the costs that may be so assessed against him, the appellee may bring an action of debt therefor, or prosecute the bonds given for appealing.

Mass. Stat. Mar. 12, 1784, act 4, sect. 4.

On an appeal from a judge of probate, where a will is in question, the cause may be tried on a feigned issue, at the expense of the appellant.

On failure of the appellant to prosecute the appeal, the decree may be affirmed on complaint.

Costs to be assessed.

An action lies for the appellee against the appellant for his costs.

Upon an appeal from a decree of the probate court, granting letters of administration to A B; the court may reverse the decree, as to the appointment of A B, and affirm it as to the residue. And in such case, the papers are remitted to the judge, who is directed to grant administration to C D or E F.

Dexter & Ux. v. Brown, 3 Mass. T. R. 32.

TITLE XI.

APPRAISERS.

1st. How appraisers are appointed and sworn, for the *division of real estate*, and for *setting off the widow's dower*.

2d. How appointed and sworn, for the appraisal of the estate of a *deceased person*.

3d. How appointed and sworn, for the appraisal of *land set off on execution*.

4th. How appointed and sworn, for the appraisal of *lost goods*, and *stray beasts*.

5th. How appointed and sworn, for the appraisal of *creatures, impounded damage feasant*.

I. How appraisers are appointed and sworn, for the division of real estate, and for setting off the widow's dower.

Mass. Stat. March 4, 1784, sect. 14.

In all cases where the appraisers, commissioners, or dividors, appointed, by the judge of probate, to perform any services respecting the estate of any person deceased, or persons appointed to set off the widow's dower therein, and are by law directed to be under oath, or sworn by the judge of probate, they may be sworn before a justice of the peace; and in case there be no justice of the peace in the same town, they may be sworn before the town-clerk; a certificate of such oath to be returned to the probate-office, from whence the warrant or commission, appointing them, issued.

II. How appointed, and sworn, for the appraisal of the estate of a deceased person.

Mass. Stat. Mar. 9. 1784, act 3, sect. 8.

These appraisers are generally appointed by, and sworn before the judge of probate.

Ibid. sect. 16.

But it is provided, that in case the estate of any person, dying intestate, shall lay more than ten miles from the

dwelling place of the judge of probate, of the county in which such estate lies, then it may be lawful for any justice of the peace to appoint the appraisers of such estate; and in case any part of the estate of any person, dying testate or intestate, shall lay without the limits of the county of the judge of probate, to whom it appertains to act as such, in the settlement of the same, then it may be lawful for any justice of the peace to appoint the appraisers of such part of such estate; and, in both the cases last mentioned, the justice of the peace, appointing appraisers, shall administer to them the necessary oaths, and shall certify the same, together with the appointment, which shall be considered as valid and effectual in law as if such persons were appointed and sworn by the judge of probate.

III. How appointed and sworn, for the appraisal of land, set off on execution.

In this case, the officer, to whom the execution is directed and delivered, shall cause three disinterested and discreet men, being freeholders in the county, one to be chosen by the creditor or creditors, one by the debtor or debtors, whose land is to be taken, if they see cause, and a third by the officer, (and in case the debtor or debtors shall neglect or refuse to choose as aforesaid, the officer shall appoint one for such debtor or debtors) to be sworn before one of the justices of the peace for the same county, faithfully and impartially to appraise such real estate as shall be shewn to them; who shall appraise the same, to satisfy the same execution with all fees, and shall set out such estate by meets and bounds. Mass. Stat. Mar. 17, 1784, act 1, sect. 2.

If an officer chooses an appraiser for the debtor, he must state, in his return, that the debtor refused to choose one; for otherwise it will not appear that the debtor had the option given him by law. Eddy v. Knapp, 2 Mass. T. R. 134.

IV. How appointed and sworn, for the appraisal of lost goods and stray beasts.

The finder of any lost goods or stray beast must, within two months, and before any use or improvement thereof is made to its disadvantage, procure from the town-clerk, or Mass. Stat. Feb. 13, 1789, act 3, sect. 2.

a justice of the peace, a warrant directed to two such disinterested, judicious persons, as the clerk or justice shall appoint, returnable into the town-clerk's office, in seven days from the date, to appraise and value the stray beast or goods upon oath, at the true value thereof in money, according to their best judgment, and to administer an oath to them for that purpose accordingly.

V. How appointed and sworn, for the appraisal of creatures, impounded *damage feasant*.

Mass. Stat. Feb. 14, 1789, act 6, sect. 4.

If the person, whose creatures are impounded, *damage feasant*, shall think the damages, mentioned in the memorandum left with the pound-keeper, are unreasonable, he may have the same ascertained by two or more disinterested, judicious persons, being thereto appointed and duly sworn, by some justice of the peace for the same county, or by the town-clerk, where no justice of the peace is; which sum, thus ascertained, shall be taken instead of the sum first left with the pound-keeper.

Ibid.

And if the owner doth not, within twenty-four hours after notice, pay the damages and charges of impounding, or replevy the creatures, the party, trespassed upon, may apply to a justice of the peace, or the town-clerk, for a warrant, directed to two or more disinterested, judicious persons; which warrant, the town-clerk of the same town, or any justice of the peace in the same county, may issue, and make returnable into the town or district clerk's office, of the same town or district, as soon as the business is performed; and may also administer an oath to the persons appointed, faithfully and impartially to estimate the damage done the party injured; and also to appraise so many of the creatures impounded, as shall be sufficient to answer the damages and all charges.

TITLE XII.

APPRENTICE AND SERVANT.

1st. Of the authority of overseers of the poor to bind out minors, of a certain description, as apprentices or as servants.

2d. Duty of overseers to inquire into the usage of minors, thus bound; and how, in case of ill usage, such minors may be released from their master.

3d. Of the action of covenant, given by statute, against the master of any such minor.

4th. What proceedings may be had in case of elopement, or gross misbehaviour, of such minor; and herein of the master's remedy against persons enticing to such elopement.

5th. Of the authority of overseers of the poor to bind out to service, *adults*, of a certain description.

6th. Of the authority of overseers to bind persons who reside in *unincorporated* places.

7th. How minors may be bound as apprentices or servants, by themselves, parents, or guardians.

8th. Duty of parents, guardians, and selectmen, to inquire into the usage of such minors; and how, in case of ill usage, such minors may be released from the service of their master.

9th. What proceedings may be had, in case such minors abscond from the service of their master.

10th. What proceedings may be had, in case of gross misbehaviour on the part of the minor.

I. Of the authority of overseers of the poor to bind out minors, of a certain description, as apprentices or as servants.

Mass. Stat. Feb. 26, 1794, act 6, sect. 4.

Overseers of the poor are empowered, from time to time, to bind out, by deed indented or poll, as apprentices, to be instructed and employed in any lawful art, trade, or mystery; or as servants, to be employed in any lawful work or labour, any male or female children, whose parents are lawfully settled in, and become actually chargeable to their town or district; also, whose parents, so settled, shall be thought, by said overseers, to be unable to maintain them, (whether they receive alms, or are so chargeable or not;) provided, they be not assessed to any town or district charges; and also all such who, or whose parents, residing in their town or district, are supported there, at the charge of the commonwealth, or whose parents are unable to support them as aforesaid, to any citizen of this commonwealth; that is to say, male children till they come to the age of twenty-one years, and females till they come to the age of eighteen, or are married; which binding shall be as valid and effectual, as if such children had been of the full age of twenty-one years, and had, by a like deed, bound themselves, or their parents had been consenting thereto; provision to be made in such deed for the instruction of male children, so bound out, to read, write, and cypher, and, of females, to read and write; and for such other instruction, benefit, and allowance, either within or at the end of the term, as, to the overseers, may seem fit and reasonable.

What description of children may be bound out.

For what time children may be bound.

Provision in the deed for the education of such children.

II. Duty of overseers to inquire into the usage of such minors; and how, in case of ill usage, such minors may be released from their master.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

It is made the duty of overseers, to inquire into the usage of children, thus legally bound out, and to defend them from injuries. And upon complaint by such overseers, made to the court of common pleas, in the county where their town or district is, or where the child may be bound, against the master of any such child, for abuse, ill treatment, or neglect; said court (having duly notified the party complained of,) may proceed to hear the complaint; and, if the same be supported, and the cause shall be judged sufficient, may liberate and discharge such child from his or her master, with costs, for which execution

may be awarded; otherwise the complaint shall be dismissed, but without costs, unless it appear groundless, and without probable cause; in which case, costs shall be allowed the respondent. And the person, thus discharged, may be bound out anew, for the remainder of the term, in manner aforesaid.

III. Of the action of covenant, given by statute, against the master of any such minor.

The overseers may have remedy by action on the deed, by which the minor is bound out, against any person liable thereby, for recovery of damages for breaches of any of the covenants therein contained; which, when recovered, shall be placed in the town or district treasury, deducting reasonable charges, and disposed of by the overseers, at their discretion, for the benefit and relief of such apprentice or servant, within the term; the remainder, if any, to be paid him at the expiration thereof. And the court, before which such cause shall be tried originally, and on the appeal, may also, on the plaintiff's request, if they see cause, liberate and discharge such apprentice or servant from his master, if it hath not previously been done in the manner pointed out by the statute.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

When brought by overseers, the money, recovered in such action, to be placed in the treasury for the benefit of the minor.

The court may also liberate the minor from his master.

And such apprentice or servant shall have like remedy when their term is expired, for the damages for the causes aforesaid, other than such (if any) for which damages may have been recovered as aforesaid, by action upon such deed, to be delivered them for that purpose, and on which no indorsement shall be necessary. Such action must, however, be brought within two years after the expiration of the term. When the deed shall have before been put in suit, an attested copy, from the proper officer, may be used, and have the same force as the original.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

Under what circumstances the minor may himself bring the action.

IV. What proceedings may be had, in case of elopement, or gross misbehaviour, of such minor; and herein of the master's remedy against persons enticing to such elopement.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

How such apprentices may be apprehended.

In case of elopement, any such apprentice or servant may be apprehended by any justice of the peace of the county where he is found, or where he may be found, upon complaint of the master, or any other on his behalf; and returned to his master by any person to whom the warrant may be directed; or may be first sent to the house of correction, at the justice's discretion.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

Of enticing to elopement.

And every person, enticing any such apprentice or servant to elope from his master, or harbouring him, knowing him to have eloped, shall be liable to the master's action for all damages sustained thereby.

Mass. Stat. Feb. 26, 1794, act 6, sect. 5.

How the apprentice may be discharged.

And the court of common pleas, either in the county where the overseers binding, or the master of any apprentice or servant bound, live, may also, upon complaint of such master, for gross misbehaviour, discharge such apprentice or servant from his apprenticeship or service, after due notice to such overseers, and hearing thereupon.

V. Of the authority of overseers of the poor to bind out to service, *adults* of a certain description.

Mass. Stat. Feb. 26, 1794, act 6, sect. 6.

What description of adults may be bound out.

Overseers have also power to set to work, or bind out to service, by deed indented or poll, for a term not exceeding one whole year at a time, all such persons, residing and lawfully settled in their respective towns or districts, or who have no such settlement within this commonwealth, married or unmarried, upwards of twenty-one years of age, as are able of body, but have no visible means of support, who live idly, and use and exercise no ordinary or daily lawful trade or business, to get their living by; and also all persons, who are liable by any law to be sent to the house of correction; upon such terms and conditions as they shall think proper.

Mass. Stat. Feb. 26, 1794, act 6, sect. 7.

The remedy given to any one aggrieved at the doings of the overseers.

Provided always, that any person, thinking him or herself aggrieved by the doings of said overseers, in the premises, may apply, by complaint, to the court of common pleas, in the county where they are bound, or where the overseers who bound them dwell, for relief; which court, after due notice to the overseers, and to their masters, shall have power, after due hearing and examination, if they find sufficient cause, to liberate and discharge the party com-

plaining, from his or her master, and to release him or her from the care of the overseers; otherwise to dismiss the complaint, and to give costs to either party, or not, as the court may think reasonable.

VI. Of the authority of overseers to bind persons who reside in *unincorporated* places.

Poor persons, standing in need of relief, living without the bounds of any incorporated town or district, shall be under the care of the overseers of the poor, appointed in the adjoining town or district, wherein the inhabitants of such unincorporated place are usually taxed: And the same overseers shall have the like authority to bind out the children of such poor persons, as they are vested with respecting the children of persons in like circumstances, inhabitants of the town or district, in which they are appointed.

Mass. Stat. Feb. 26, 1794, act 6, sect. 7.

What description of children may be bound out.

And such overseers may also set to work, or bind out as aforesaid, for a space not exceeding one whole year at a time, all such persons, above the age of twenty-one years, married or unmarried, residing in their county, but without the bounds of any town or district, as are able of body, but have no visible means of support, or who live idly, using no ordinary, or daily lawful business or trade, to get their living by; or who are liable, by any law, to be sent to the house of correction; and shall receive and apply their earnings (deducting reasonable charges) to the support of them or their families, if any they have, at their discretion; saving to such persons the like remedy for relief, if they think themselves aggrieved, as, by the statute, is provided for persons set to work, or bound out for like causes, by overseers of towns.

Mass. Stat. Feb. 26, 1794, act 6, sect. 7.

What description of adults may be bound out.

Their earnings to be applied to the support of themselves and their families.

The remedy given to any one aggrieved at the doings of the overseers.

VII. How minors may be bound as apprentices or servants, by themselves, parents, or guardians.

Minors, under the age of fourteen years, may be bound by deed, until that age, as servants and apprentices, by their father, and, in case of his decease, by their mother, or by their guardian legally appointed; or, having no parent or guardian, they may bind themselves, with the ap-

Mass. Stat. Feb. 28, 1795, act 8, sect. 1.

Of minors under the age of 14; by whom they may be bound, and to what age.

probation of the selectmen, or major part of them, of the town where such minors reside.

Mass. Stat. Feb. 28, 1795, act 8, sect. 1.

Of minors of the age of 14 and upwards; by whom they may be bound, and to what age.

And all minors, of the age of fourteen years, or upwards, may be bound by deed, as apprentices or servants; females, to the age of eighteen years, or to the time of their marriage, within that age; and males, to the age of twenty-one years, by their father, and, in case of his decease, by their mother, or guardian legally appointed, having the minor's consent expressed in the deed.

Mass. Stat. Feb. 28, 1795, act 8, sect. 1.

In what cases such minors may bind themselves.

And any such minor, having no father, mother, or guardian, within the commonwealth, may, by deed, bind themselves, with the approbation of the selectmen, or the major part of them, of the town where they reside.

Mass. Stat. Feb. 28, 1795, act 8, sect. 1.

Of the deed, by which such minor shall be bound.

Provided, that in every case, there shall be two deeds of the same form and tenor, executed by both parties; one to be kept by each party; and where made by the approbation of the selectmen, they, after having examined the terms of the deeds, shall express their approbation thereon, and sign the same. Provided also, that all considerations which shall be allowed by the master or mistress, in any contract of service or apprenticeship, shall be secured to the sole use of the minor thereby engaged. And all contracts, which shall be made by any parent or guardian, or by any minor for him or herself, pursuant to the statute, shall be good and effectual in law, against all parties, and the minors thereby engaged, according to the tenor thereof.

All considerations, allowed by the master, to be secured to the use of the minor.

Contracts, between the parties, declared valid.

Mass. Stat. Feb. 28, 1795, act. 8, sect. 5.

No covenant of apprenticeship, entered into by any minor, his parent, or guardian, for the purpose of such minor's learning, or being instructed in any art or mystery, and made to any master, and the wife of such master, or to the executors, administrators, and assigns of such master, shall be binding on such minor, parent, or guardian, after the decease of the master; but, on the death of such master, the said covenant shall be deemed void from that time; and, in any such case, any minor may be bound out anew, in the manner herein before prescribed.

The contract becomes void on the death of the master; and, in such case, the minor may be bound out anew.

VIII. Duty of parents, guardians, and selectmen, to inquire into the usage of such minors; and how, in case of ill usage, such minors may be released from the service of their masters.

It is made the right and duty of all parents and guardians, and of selectmen for the time being, (where selectmen shall give their approbation to the binding out of a minor, as aforesaid) binding minors, as aforesaid, to inquire into their usage, and defend them from the cruelties, neglects, or breach of covenant of their masters or mistresses; and such parents, guardians, or selectmen, for the time being, may complain to the court of common pleas, in the county whereof such master or mistress is an inhabitant, against him or her, for any personal cruelty, neglect, or breach of covenant; and the court, after having duly notified the party complained against, shall proceed to hear and determine such complaint, with or without a jury, according as the allegations of the party may be. And if the same complaint shall be supported, the court may render judgment, that the said minor be discharged from his or her apprenticeship or service, with costs against the master or mistress, and award execution accordingly; in which case, the deed of service, or apprenticeship, shall be deemed void from the time of rendering such judgment, and the minor may be bound out anew: But if such complaint shall not be supported, the court shall award costs to the respondent, against the parent, guardian, or selectmen, (where the complaint of the selectmen shall be without probable cause,) and execution accordingly.

Mass. Stat. Feb. 28, 1795, act 8, sect. 2.

Complaint to the common pleas, against the master, for cruel usage, &c.

Notification to the master.

Trial of the complaint.

Judgment, in case the complaint be supported.

Judgment, in case the complaint be not supported.

IX. What proceedings may be had, in case such minor absconds from the service of his master.

If any servant or apprentice, bound as aforesaid, shall depart from the service of his or her master, or mistress, it shall be lawful for any justice of the peace, of the county where such servant or apprentice may be found, on complaint made to him by the master, or mistress, or by any one in his or her behalf, on oath, to issue his warrant to the sheriff, or his deputy, or any constable within the county, directing him to apprehend such servant, or apprentice, and to bring him or her before the said justice; who, upon the hearing, shall order the said servant, or apprentice, to be returned to the place of his or her duty; or to commit him or her to the gaol of the county, there

Mass. Stat. Feb. 28, 1795, act 8, sect. 3.

Of the apprehension of such minor.

Order of the justice, before whom he is brought.

to remain for a term not exceeding twenty days, unless sooner discharged by his or her master or mistress.

Duty and authority of the officer who receives the justice's warrant for the return of the minor.

And the justice's warrant, for returning such servant or apprentice to the place of his or her duty, directed to any officer, or other person, by name, shall authorize him to convey any such servant or apprentice to such place, notwithstanding it may be in any other county in the commonwealth; and the costs of the process and commitment, by the said justice, shall be paid by the master or mistress, to be recovered by him or her on the deed or covenant; and when recovered of the guardian, the same, with all further costs he may be held to pay, shall be a proper article of charge in his guardianship account.

By whom the costs of process and commitment are to be paid.

X. What proceedings may be had, in case of gross misbehaviour on the part of the minor.

Mass. Stat. Feb. 28, 1795, act 8, sect. 4.

If any servant or apprentice, bound as aforesaid, shall be guilty of any gross misbehaviour, wilful neglect, or refusal of his or her duty, the master or mistress may complain thereof to the court of common pleas, in the county whereof he or she is an inhabitant; and the said court, after having duly notified such servant or apprentice, and all persons, covenanting on his or her behalf, and the selectmen, for the time being, of the town (where the selectmen shall approve as aforesaid) shall proceed to hear and decide on such complaint, with or without a jury, as the allegations of the parties may be; and if the said complaint shall be supported, the court may render judgment, that the master or mistress shall be discharged from the contract of service or apprenticeship, and every article thereof obligatory on him or her, with costs; and award execution for costs accordingly, against the parent, guardian, or minor, where the minor shall engage, as aforesaid, for him or herself. And any servant or apprentice, whose master or mistress shall be discharged as aforesaid, may be bound out anew.

Complaint to common pleas, against the minor.

Notification to the minor, and others concerned.

Trial of the complaint.

Judgment in case the complaint be supported.

TITLE XIII.

ARSON, AND OTHER MALICIOUS BURNINGS.

ARSON, by statute, is the wilful and malicious burning of the dwelling-house of another, in the night time. Mass. Stat. March 16, 1805, act 7, sect. 1.

At common law, not only the dwelling-house, but all out-houses, that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subjects of arson. So also, at common law, the circumstance of *time*, when the burning was committed, whether by night or by day, created no difference, either in the offence or the punishment. 4 Bl. Com. 221. Ibid. 220.

But, by our statute, a wise and humane discrimination is displayed in the selection and classification of subjects and circumstances.

1st. Punishment for burning a dwelling-house, *in the night time.*

2d. Punishment for burning a dwelling-house, *in the day time.*

3d. Punishment for burning, *in the night time*, any public building; or building, within the curtilage of a dwelling-house.

4th. Punishment for burning, *in the day time*, any *public* building; or building *within* the curtilage of a dwelling-house: or for burning, either by *night* or by *day*, any *private* building, *not* within the curtilage of a dwelling-house; or any vessel, lying within the body of any county.

5th. Punishment for other malicious burnings.

I. Punishment for burning a dwelling-house, *in the night time.*

Mass. Stat. Mar. 16, 1805, act 7, sect. 1.

If any person shall, wilfully and maliciously, set fire to the dwelling-house of another, or to any out-building adjoining to such dwelling-house, or to any other building; and, by the kindling of such fire, or by the burning of such other building, such dwelling-house shall be burnt in the night time; every such offender, and any person present, aiding, abetting, or consenting in the commission of such offence, or accessory thereto before the fact, by counselling, hiring, or procuring the same to be done, who shall be duly convicted, before the supreme judicial court, of either of the felonies and offences aforesaid, shall suffer the punishment of death.

For the punishment of accessories after the fact, the reader is referred to title ACCESSORIES, page 46.

II. Punishment for burning a dwelling-house, *in the day time.*

Ibid. sect. 2.

If any person shall wilfully and maliciously burn, in the *day time*, the dwelling-house of another, or any out-building adjoining to such dwelling-house, or any other building, whereby such dwelling-house shall be burnt; every such offender, and any person present, aiding, abetting, or consenting in the commission of such offence, or accessory thereto before the fact, by counselling, hiring, or procuring the same to be done, who shall be duly convicted, before the supreme judicial court, of either of the felonies and offences aforesaid, shall be punished by solitary imprisonment for such term, not exceeding one year, as the justices of the said court, before whom the conviction may be, shall sentence and order, and by confinement afterwards, to hard labour, for life.

For the punishment of accessories *after* the fact, the reader is referred to title ACCESSORIES, page 46.

III. Punishment for burning *in the night time*, any *public* building; or building within the *curtilage* of a dwelling-house.

Ibid.

If any person shall, wilfully and maliciously, set fire to any meeting-house, church, court-house, town-house, college, academy, or other building erected for public uses,

or to the store, barn, or stable, of another, within the curtilage of any dwelling-house; and, by the kindling of such fire, such meeting-house, or other building erected for public uses, or such store, barn, or stable, shall be burnt in the *night time*; every such offender, and any person present, aiding, abetting, or consenting, in the commission of such offence, or accessory thereto before the fact, by counselling, hiring, or procuring the same to be done, who shall be duly convicted, before the supreme judicial court, of either of the felonies and offences aforesaid, shall be punished by solitary imprisonment, for such term, not exceeding one year, as the justices of the said court, before whom the conviction may be had, shall sentence and order; and by confinement, afterwards, to hard labour, for life.

For the punishment of accessories *after* the fact, the reader is referred to title ACCESSORIES, page 46.

IV. Punishment for burning, *in the day time*, any public building: or building *within the curtilage* of a dwelling-house: Or for burning, *either by night or by day*, any private building, *not* within the curtilage of a dwelling-house; or any vessel, lying in the body of any county.

If any person shall, wilfully and maliciously, burn, in the *day time*, any meeting-house, or other building erected for public uses, or any store, barn, or stable of another, within the curtilage of any dwelling-house; or if any person shall, wilfully and maliciously, burn, *by night or by day*, any other store, barn, stable, house, or building whatsoever, or any ship or vessel, lying in the body of any county; every such offender, and any person, aiding or consenting in the commission of such offence, who shall be duly convicted thereof before the supreme judicial court, shall be punished by solitary imprisonment, for such term, not exceeding one year, and by confinement afterwards to hard labour, for such term, not exceeding ten years, as the justices of the said court, before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence. Mass. Stat. March 16, 1805, act 7, sect. 3.

Commonwealth v. Macomber. 3 Mass. T. R. 254.

The fifth section of this statute provides for the punishment of *accessories after the fact*; but it has been decided that such section does not apply to the offences prohibited in the third section, last above quoted; and that, in its application, it is limited to the offences described in the first and second sections of the statute.

V. Punishment for other malicious burnings.

Mass. Stat. Mar. 16, 1805, act 7, sect. 4.

If any person shall, wilfully and maliciously, burn any stack of corn, hay, grain, straw, corn-stalks, flax, fences, piles of wood, boards, or other lumber; or any soil, grass, trees, poles, or underwood, of another; every such offender, and any person, aiding and consenting in the commission of such offence, who shall be duly convicted thereof before the supreme judicial court, shall be punished by solitary imprisonment, for such term, not exceeding six months, and by confinement afterwards to hard labour, for such term, not exceeding three years, or by fine not exceeding five hundred dollars, and by imprisonment in the common gaol, not exceeding one year, at the discretion of the justices of the said court, before whom the conviction may be, and as they shall sentence and order, according to the nature and aggravation of the offence.

Commonwealth v. Macomber, 3 Mass. T. R. 254.

The fifth section of this statute provides for the punishment of *accessories after the fact*; but it has been decided, that such section does not apply to the offences prohibited in the fourth section, last above quoted, and that, in its application, it is limited to the offences described in the first and second sections of the statute.

NOTE. "An act, against arson, and other malicious burnings," passed March 11, 1785, was repealed March 11, 1806.

TITLE XIV.

ASSAULT, BATTERY, AND MAIMING.

AN ASSAULT is the unlawful setting upon the person of any one, by the offer or attempt to beat, though without touching the person; as by raising a stick or fist to strike, making a blow at a person, but missing him: So, lying in wait, or besetting one's house, is an assault, in law. 1 Esp. Dig. 383. 3 Bl. Com. 120.

But *words alone* will not make an assault; though what might otherwise be deemed an assault, words might explain away: As if a person lays his hand on his sword, as if to draw it, this might be deemed an assault; but when the party added, "If this was not assize-time, I would not take such language." These words explained away the implied assault. 1 Esp. Dig. 383. Tuberville v. Savage, 1 Mod. 3.

BATTERY is the actual commission of violence to the person, as by beating, striking, pushing violently, spitting in the face, or doing any such injury, in a rude or insolent, an angry or spiteful manner. 1 Esp. Dig. 383. 1 Bac. Abr. 154.

The least touching of another's person, wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: Every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. 3 Bl. Com. 120.

Under this head, too, falls mayhem, which is a more heinous kind of battery; that of wounding and depriving a person, in consequence of it, of any member necessary for his defence; as an arm, hand, eye, &c. 1 Esp. Dig. 383.

1st. In what cases an action of assault and battery will lie.

2d. What will excuse or justify the defendant in this action.

3d. Of the *pleadings*, on the part of the *plaintiff*.

4th. Of the *pleadings*, on the part of the *defendant*.
5th. Of the *evidence*, on the part of the *plaintiff*.
6th. Of the *evidence*, on the part of the *defendant*.
7th. Of the verdict and damages.
8th. Of the costs.
9th. Of assault and battery, considered as an offer against the peace.
10th. Of maiming ; and how punished.
11th. Of felonious assaults ; and how punished.

I. In what cases an action of assault and battery will

1 Esp. Dig. 384.

The act, causing the injury to the plaintiff, need not p ceed from the *immediate* assault or act of the defenda for any wanton act, by which another person or thi causes a battery, will support the action.

Scott v. Shepherd, 3 Wils. 403
2 Bl. Rep. 892.
1 Esp. Dig. 384.

As where defendant threw a lighted squib into the m ket-place, which, being tossed from hand to hand by ferent persons, at last hit the plaintiff in the face, and out his eye. This action was adjudged to lie, though injury was not caused by the *immediate* act of defend himself.

Bull. N. P. 16.
1 Esp. Dig. 384.

So if a person pushes a drunken man against anotl man, and hurts him, this is actionable, as an assault a battery. But if defendant intended to do a right act, as assist him in going along the street, and, in so doing, injury is done, he will not be answerable.

Gibbons v. Pepper, Salk. 637.
1 Esp. Dig. 385.

So if, by a sudden fright, an horse runs away with rider, and runs against a man, it is no battery ; and t may be given in evidence, on the general issue ; but if a person had whipped the horse, and made him run aw with the rider, and an injury to the rider, or a third pers had been the consequence ; the person, who thus whipp the horse, would be liable to an action of assault and batte

Ibid.

The injury, complained of by this action, must be co mitted through the fault of the defendant, otherwise action will not lie. As if a soldier, at exercise, by accide hurt his companion, it is not actionable.

But, in such case, the act, causing the injury, must purely accidental ; and without any carelessness or bla

on the part of the defendant; for otherwise the defendant will be answerable for the injury in this action.

As where the defendant was uncocking a gun, and the plaintiff standing by to see it, it went off, and wounded him; it was held, that defendant was liable to the plaintiff for the injury. For every man is liable for every injury he does, although he do it without any design, unless the injury done by him was inevitable: And, in this case, defendant was doing an act which he was under no obligation to perform. 3 Wils. 407, cit. 2 Stra. 596.

Where a person receives a bodily injury, in consequence of an act done by *his own consent*, he shall not maintain this action. 1 Esp. Dig. 385.

As where two persons played at cudgels by consent, and one hurt the other, it was held to be no battery; for *volenti non fit injuria*. Ibid.

But, in such case, the act, from whence the injury proceeds, must be lawful. Ibid.

For where, in this action, defendant would have given in evidence, that the plaintiff and he *boxed by consent*, from whence the injury proceeded; it was held to be no bar to the action; for, as the act of boxing was unlawful, the consent of the parties to fight could not excuse the injury. Bull. N. P. 16. 1 Esp. Dig. 385.

So also it has been held, that if one license another to beat him, such license is void, because it is against the peace. In such case, therefore, plaintiff is entitled to a verdict. Matthew v. Gilerton, Comb. 218.

If two commit a battery, and one of them dies after issue joined, yet shall the action continue against the other. Cro. Eliz. 145. 1 Esp. Dig. 386.

This action lies, not only against him who commits the injury, but against him also, at whose command it is done: hence if A commands B to beat another person, and B does it accordingly, A is guilty of the trespass, as well as B. 1 Selw. 22.

Although the plaintiff declares for an assault and battery, yet he may recover for the assault only. Ibid.

II. What shall excuse or justify the defendant in this action.

Wherever a person is acting under any authority, given to him by law, *that* shall be a sufficient justification. 1 Esp. Dig. 386.

1 Esp. Dig. 386.

As if an officer has a writ or warrant against a pers who will not suffer himself to be arrested, the officer m justify a beating, or even wounding, in the attempt to rest him.

Williams v. Jones, 2 Stra. 1049.

But a *battery* cannot be justified by an *arrest only*, it only justify the *assault*; for to justify a battery, *resistan* or an attempt to rescue himself out of custody, should shewn; unless it be by way of *molliter manus imposu* that is, that defendant put his hands gently on the plainti in which way alone, defendant may justify the beati without shewing any resistance or attempt to rescue.

Bull. N. P. 19.

1 Esp. Dig. 386.

See Stor. Plead. 490.

So defendant may plead, that plaintiff and another w combatting together, and that, to prevent any further bre of the peace, he interposed to separate the parties; laid his hands gently on the plaintiff for that purpose.

Mass. Stat. Oct. 28, 1786, sect. 1.

So also, if there be a riot, and the rioters refuse to perse within one hour after proclamation made; in s case, the peace officer, or his assistant, may seize th And this matter may be pleaded in justification.

Ibid.

So also, if, in the endeavour to seize them, the riot make resistance, and are wounded; this resistance may pleaded in justification by the peace officer, or his assist

Howe v. Planner, 1 Saund. 13.

1 Esp. Dig. 387.

So, in the exercise of his office, a church-warden m justify taking off the hat, or gently laying hands on a p son who is disorderly in church, and turning him out disturbing the congregation.

Leward v. Basely, 1 Ld. Raym. 62.

Salk. 407.

A man may justify an assault and battery, in defence his wife, parent, or child. So a wife may justify an ass in defence of her husband. A servant may, in like m ner, justify an assault in defence of his master; but a m ter cannot justify an assault in defence of his servant: the master may have an action against the person v beats his servant, with a *per quod servitium amisit*; but servant can have no such action for beating his master.

1 Esp. Dig. 387.

Ibid.

So one may justify the battery of a person who ende ours wrongfully to dispossess him of his lands, or to t away his goods. But, in the case of an entry on the lan it must not be justified as a battery, but as a *molliter ma imposuit*, or that the defendant gently laid his hands u the plaintiff.

But a plea of *molliter manus imposuit*, in order to turn the plaintiff out of defendant's house, where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows, and knocking her down. Gregory & Ux. v. Hill, 8 T. R. 299.

But where the injury is such a breach of a person's close, as amounts only to force *in law*, defendant cannot justify a battery, without *a request to depart*. But it is otherwise, where one *actually* breaks down a gate, or enters with *actual* violence; for there it is lawful to resist force with force; and if the resistance be excessive, the plaintiff may shew it by new assignment. Green v. Goddard, 2 Salk. 641. 1 Esp. Dig. 388. Weaver v. Bush, 8 T. R. 78.

A parent may give reasonable correction to his child; a master to his servant or apprentice; a schoolmaster to his scholar, or a gaoler to his prisoner. All these, therefore, are special justifications. 3 Bl. Com. 120. 1 Esp. Dig. 388.

Wherever the assault and battery has proceeded from the plaintiff's own fault, it is a sufficient justification for the defendant. Ibid.

As, where plaintiff and defendant being at play, the plaintiff thrust his money into defendant's heap, upon which defendant kept it, and then a dispute and struggle took place, which was the assault complained of. The court held the defendant justified, and not guilty; for the first fault proceeded from the plaintiff, as in this way a man might be made a trespasser against his will. Ward v. Ayre, Cro. Jac. 366. 1 Esp. Dig. 388.

The most usual justification, in this action, is that of *son assault demesne*, or that the first assault proceeded from the plaintiff himself.

If defendant proves, that the plaintiff first lifted up his stick to strike him, and offered so to do; it is a sufficient assault to justify his striking the plaintiff; for he need not stay till the plaintiff has actually struck him, for he might be disabled by the blow. Bull. N. P. 18. 1 Esp. Dig. 388.

But there must be some proportion between the battery given and the first assault; for every assault, however small, will not justify an enormous battery. Ibid. 389.

And the rule is laid down by lord Holt, who held, that the meaning of the plea of *son assault demesne* was, that defendant struck in his own *defence*: So that if A strikes B, and a scuffle

ensues, and the parties close immediately, and in the sc

Cockcroft v. Smith, 2 Salk. 642.

fle A is even mayhemed by B ; *that* is to be justified un the plea of *son assault :* But if, upon a light blow given B, he gives a blow in return, which mayhems A, *that* is to be justified under *son assault demesne*. For the rea why *son assault* is a good plea in mayhem is, beca it might be such an assault as would endanger def dant's life.

S. C. cit. in 1 Ld. Raym. 177.

1 Esp. Dig. 389.

Therefore, in this case, the chief justice directed jury to give a verdict for the defendant, in a mayhem, first assault being by tilting the form whereon the def dant sat.

III. Of the pleadings on the part of the plaintiff.

Mitchell v. Neale & Ux. Cowper 818.

1 Esp. Dig. 390.

The declaration, in assault and battery, cannot lay offence on a certain day, and *at divers other days and tim* for an assault is one individual act, a distinct offence, cannot be laid with a continuando.

Benson v. Swift, 2 Mass. T. R. 50.

In the case Benson *vs.* Swift, which was an action assault and battery, there was a motion in arrest of jud ment, because the plaintiff had alleged in his declarati

Motion in arrest of judgment, on the ground that the trespass was laid with a continuando.

" that the defendant, on such a day, &c. did make an assa on the plaintiff, and, making fast his body in an inclini posture, over a large water cask, did beat, bruise, a wound him, with a large three inch plank ; by mea whereof he was lacerated and maimed ; *and thereaft wards, the said defendant, continuing his assault aforesaid,* the body of the plaintiff, with force, &c. to wit, with fo parts of a two inch and an half rope, did beat, &c." A this, the defendant contended, was laying the trespass w a *continuando*. But the court overruled the motion, a granted judgment according to the verdict ; because it d not appear that the trespass was so alleged as to be broug within the *legal* and *technical* import of a *continuan* " Thereafterwards, *continuing* his said assault," may understood to imply nothing more than a continuation the trespass, without intermission of time, longer than w sufficient to change the instruments used ; first beating t plaintiff with the plank, and afterwards, with the rope ; continuing, the whole time of the beating, with both t

Motion overruled.

instruments, lashed over the cask ; so that there never was a cessation of the first assault, nor of the beating.

So also the offence should be charged fully, and positively, and not by way of recital ; as, " *whereas* A B, on such a day, made an assault." Amyon v. Shore, 1 Stra. 621. 1 Esp. Dig. 390.

But this mode of declaring, by way of recital, is a mere formal and not a substantial defect ; it must therefore be taken advantage of by special demurrer ; for it will be good after verdict, or on general demurrer. Coffin v. Coffin, 2 Mass. T. R. 358.

The day is not material. Proof of the trespass at any time before the commencement of the action is sufficient. 1 Inst. 283, a.

For a battery of the wife, the husband and wife should join in the action, and the damages be laid *ad damnum ipsorum*, or to *their* damage ; first, because the husband is damnified by being put to expense for her cure, and in suing the action ; and, secondly, because the action and damages survive to the wife, on whom the injury has been committed. 2 Ld. Raym. 1208. Sid. 387. 1 Esp. Dig. 390.

And therefore, where the action was by husband and wife, for a battery of the wife, and laid to the damage of the *husband*, the judgment was arrested ; for so the damages would not survive to the wife, they being recovered only to the husband. So if the assault and battery has been committed against *both husband and wife*, he must bring his action alone for the injury done to himself ; for the wife cannot join in an action for an injury done to the husband : And therefore, where a joint action was brought for such battery, and damages separately assessed, the writ abated as to the husband. Newton v. Hatter, 2 Ld. Raym. 1208. 1 Esp. Dig. 391. Buckley v. Hale, Cro. Jac. 655.

Plaintiff, in his declaration in this action, may lay many things in aggravation, for which he himself could not maintain an action : As here, " for making an assault on himself, entering his house, and assaulting his servants," &c. Newman v. Smith, Salk. 642. 1 Esp. Dig. 391.

So where plaintiff brought trespass for breaking and entering his dwelling-house, and taking his goods, &c. and for *assaulting and terrifying and falsely imprisoning the plaintiff's wife and daughter*. Before the verdict, the plaintiff entered upon the record a release of all damages, on account of the *terrifying and falsely imprisoning his daugh-* Heminway v. Saxton & al. 3 Mass. T. R. 222.

ter. After verdict, there was a motion in arrest of judgment; and it was said that there were *three distinct causes of action*, which could not be joined; that, for the injury to the daughter, she must bring her own action; and for that to the wife, the husband and wife ought to join. But the court decided, that, as to the injury to the wife, it was alleged merely in *aggravation;* and the injury to the daughter was out of the case, by the plaintiff's release.

King v. Phippard, Comb. 227.

If defendant pleads, *son assault demesne*, and the plaintiff can justify, he should plead it; for he cannot give it in evidence under the general replication of *de injuria sua propria*, or that the assault was of the plaintiff's own wrong.

1 Esp. 391.

Ibid.

In this action, as in all others founded on torts, if the battery has been committed by several, the plaintiff may bring his action either jointly or severally.

IV. Of the pleadings on the part of the defendant.

To this action, there are three species of defence: The first is the *general issue*, not guilty; the second, *matter of excuse*, as that it was done by accident, and without defendant's fault, &c. which may also be given in evidence on the general issue; the third is a *justification;* which insists upon some matter, which made it lawful for defendant to make the assault. But a justification must always be pleaded, and cannot be given in evidence on the general issue. As, upon the general issue, defendant cannot give in evidence *son assault demesne*, or that the first assault proceeded from the plaintiff; for it is a justification.

Bull. N. P. 17.

1 Esp. Dig. 392.

Co. Litt. 282. b.

Mass. Stat. Mar. 11, 1784, act 3, sect. 7.

However, in actions before a *justice of the peace*, the defendant may give matter of justification in evidence on the general issue.

If an indictment has been preferred for the same assault, and defendant confessed it, and such confession has been entered on the record, this precludes defendant from pleading not guilty, to an action brought for the same offence. In such case therefore it is adviseable for defendant to plead *nolo contendere* to the indictment, that is, that he will not contend with the commonwealth; for this plea neither confesses nor denies the offence; and therefore, in case of a civil action afterwards brought, leaves him at liberty to deny the charge.

1 Esp. Dig. 392.

The plea should go to the whole offence, as charged in the declaration, or plaintiff shall have judgment. But if the plea is a justification, it shall go only to that part of the offence, of which it takes notice; *son assault* goes to the whole. 1 Esp. Dig. 392.

For where, in trespass, for assault, battery, and *wounding*, defendant pleaded, that he was constable of D, and, for a misdemeanor of the plaintiff's, that he laid hands on him, and carried him to the stocks, *which is the same trespass*; on demurrer, plaintiff had judgment; for the plea is justification, and goes only to the assault and battery, but takes no notice of the *wounding*, which is charged in the declaration. Pendlebury v. Elmott, Cro. Eliz. 268.

Neither is the general traverse, as to the rest, sufficient. 1 Esp. Dig. 393.

For where, in assault, battery, and *false imprisonment*, defendant justified the *imprisonment*, but said nothing more than a general traverse to the assault and battery; plaintiff had judgment; for it was not sufficient to justify the imprisonment alone, though it include a battery; but defendant should have pleaded to the assault and battery, by shewing resistance made to the arrest. Trescott v. Carpenter, 1 Ld. Raym. 229.

In an action against a *servant*, if he pleads a justification in defence of his master, he must plead it thus, "*that the plaintiff would have struck his master, if he had not interposed, and struck the plaintiff.*" For the servant can only strike to *prevent* an injury, and not by way of *revenge*: And therefore, where the servant pleaded, "*that plaintiff, having struck his master in his presence, that he, in his master's defence, struck plaintiff,*" the plea was held to be ill on demurrer; for the assault on the master might be over, when the servant struck the plaintiff. Barfoot v. Reynolds, 2 Stra. 953.

So, in an action against husband and wife, the wife may plead, "*that plaintiff was going to wound the husband, and that she made the assault to defend him, and prevent the plaintiff from beating him.*" Leward & Ux. v. Basely, 1 Ld. Raym. 62.

But in this, or any other plea, the wife cannot plead *alone*; the husband must always join. 1 Esp. Dig. 394.

A former recovery of damages, in an action for the same offence, is a good plea in bar. Ibid.

1 Esp. Dig. 394.

And if the plaintiff has once recovered damages for the assault and battery, he cannot afterwards recover, in a new action, for any further mischief or injury arising from the same battery.

Fetter v. Beale, Salk. 11.

As where, after the plaintiff had recovered damages for the battery, a piece was cut out of his skull, in consequence of the former wounding, for which he brought a new action; but it was held not to lie; for the battery itself is the ground of the action, and the injury the measure of the damages; but here the ground of the action was gone, by the first recovery.

Broome v. Wooton, Yelv. 68.

So, if a battery has been committed by *several*, and a recovery had against *one*, such recovery may be pleaded in bar to an action brought against any of the others for the same battery. For plaintiff can receive but one recompense for the same injury.

Mass. Stat. Feb. 13, 1787, sect. 1.

The statute of *limitations* is also a good plea in bar. By this statute it is provided, that actions of assault and battery must be commenced within three years next after the cause of such actions, and not after.

Blackmore v. Tidderly, Ld. Raym. 1089.

Macfadzen v. Olivant, 6 East's Rep. 388.

If defendant mistakes the limitation of time, and pleads not guilty within *six* years, the plea will be bad on demurrer. From a recent case, it appears that this demurrer must be special.

1 Selw. 27.

In framing justification in defence of possession, it is not necessary for the defendant to set forth the particulars of his title; it is sufficient for him to state that he was possessed, &c.; for this is merely inducement and conveyance to the substance of the plea.

Co. Litt. 282. b.

This being a transitory action, in which the time or place are merely inducement, the place cannot be traversed without *special cause* of justification; as if a constable of a town, of another county, arrests the body of a man that breaketh the peace there, he may traverse the *county*, because such justification is local; but he must not confine his traverse to the *county* merely, but must extend it to "*all other places, saving the town whereof he is constable.*"

Matthews v. Cary, 3 Mod. 137, 138.

When the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea.

If a justification be at the same time and place, it is needless to aver that it is the same trespass. King & Ux. v. Phippard. Carth. 281.

Where the defendant pleads a local justification, the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure. Serle v. Darford, Ld. Raym. 120. Lutw. 1435. 1 Selw. 31.

In framing pleas of justification, care must be taken, that the battery be admitted and confessed; otherwise, on demurrer, the plaintiff will be entitled to judgment; for it is a rule of pleading, that the party justifying must shew and admit the fact. 1 Selw. 30. 1 Inst. 282, b.

V. Of the evidence on the part of the plaintiff.

As the plaintiff in this action may also prosecute the defendant, by indictment for a breach of the peace, the plaintiff cannot, therefore, give in evidence, in the action, *a conviction on an indictment* for the same assault: For it is a rule of evidence, that no verdict shall be given in evidence, except where the parties have been the same; and in one case the commonwealth is a party, and in the other, the plaintiff. Nor is any thing to be admitted in evidence, of which both parties have not equal benefit; that is, such as either party should be equally at liberty to give in evidence, in case it made for him. Jones v. White, 1 Stra. 68. 1 Esp. Dig. 306.

In this action, plaintiff cannot give in evidence *remote, or not obviously probable effects of the battery*, unless they are stated in the declaration, under a *per quod*. 1 Mass. T. R. 12.

But obviously probable effects of the battery may be given in evidence, although not laid in the declaration; and the jury are to judge whether these effects did, or did not, necessarily, or beyond reasonable doubt, result from the bruise or wound. Avery v. Ray & al. 1 Mass. T. R. 12.

As in this case: The declaration was general, containing no allegation of any special damage: nor was it stated that the wounding, bruising, &c. were followed by any particular ill consequence; yet the physician who attended the plaintiff in consequence of the injury, was allowed to testify as to a fever, which the plaintiff had, and which the physician thought might have originated from the battery. Same Case.

VI. Of the evidence on the part of the defendant.

1 Esp. Dig. 397.

There is a difference to be observed between what may be given in evidence on *son assault demesne*, and on *not guilty*. If defendant pleads *son assault demesne*, and plaintiff replies *de injuria sua propria*, &c. plaintiff shall not be allowed to give in evidence, a battery at another day or place than that laid in the declaration; but, upon not guilty pleaded, plaintiff may give in evidence, an assault and battery, at any place, or at any time, before action brought.

Dickinson v. Davis, 1 Stra. 480.

In an action by husband and wife, for a battery of the wife, on the general issue pleaded, defendant shall not be allowed to prove, or go into evidence, that the woman is not wife of the plaintiff; it should be pleaded in *abatement*, that plaintiff might meet the objection fairly.

Watson v. Christie, 2 Bos. & Pull. 224.

In this action, defendant may give in evidence, in mitigation of damages, such provocations as do not amount to a justification; for if they amount to a justification, they ought to be specially pleaded.

Avery v. Ray & al. 1 Mass. T. R. 12.

But the provocations thus offered in evidence, in mitigation of damages, must be *immediate*, and such as happened *at the time* of the assault. For where the intervening time between the provocations and the assault, is long enough for the restoration of the passions, the evidence will not be admitted.

Same case.

As in this case: The defendant offered to prove in mitigation of damages, that plaintiff had propagated a most infamous story, concerning the defendant's sister; and that this provoked him to the assault complained of: But it appearing, that nothing of this kind passed at the *time* of the assault, the court refused to admit the evidence.

VII. Of the verdict, and damages.

Litt. sect. 485.

In assault and battery, if the jury find, upon the plea of not guilty, the defendant guilty in another town, or at another day, than the plaintiff has laid, yet shall the plaintiff recover, for it is transitory.

1 Esp. Dig. 398.

As to the damages, it is a general rule, that the plaintiff shall have but one recompense in damages, though the assault and battery be committed by several, and though his action be brought either joint or several.

As where in assault and battery against two, one pleaded *not guilty*, and the other pleaded *son assault demesne*, and both issues were found for the plaintiff; it was held that there should be but single damages assessed. So where one defendant had pleaded specially, and plaintiff demurred, and had judgment on demurrer; it was adjudged that there should be but single damages assessed.

Crane & Hill, v. Hummerston, Cro. Jac. 118.

1 Esp. Dig. 398.

Sir T. Heydon's Case, 11 Co. 7.

Therefore where plaintiff declares jointly, the jury cannot sever the damages, so as to give greater against one than another. But if the jury find otherwise, the plaintiff may enter a *nolle prosequi* against all but one, and have judgment against him.

Rodney v. Strode, Carth. 19.

1 Esp. Dig. 398.

But in this, as well as other actions of trespass against several, the jury may find some guilty, and others not guilty.

Ibid. 399.

And in the case of an action against husband and wife, the jury may find the wife guilty, and the husband not guilty; and so, *vice versa*.

Ibid.

VIII. Of the costs.

By statute it is enacted, that no action shall be sustained in any court of common pleas, where the damage demanded does not exceed twenty dollars, unless by appeal from a justice of the peace, saving such actions wherein the title to real estate is concerned; and if, upon any action originally brought before the court of common pleas, judgment shall be recovered for no more than twenty dollars, debt or damage, in all such cases, the plaintiff shall be entitled, for his costs, to no more than one quarter part of the debt or damage so recovered.

Mass. Stat. Mar. 11, 1808, sect. 2.

IX. Of assault and battery, considered as an offence against the peace.

An assault and battery is not only a private injury, but is also a public wrong; inasmuch as it involves a breach of the peace. The offender is therefore liable, not only to the injured party, in an action for damages, but also to the commonwealth, on indictment, in a court of record, or on complaint, before a justice of the peace; whose duty it is, in case of a high-handed assault and battery, to recognize

4 Bl. Com. 216.

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Mass. Stat. Mar. 9, 1804, act 17, sect. 3 & 4.
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X. Of maiming; and

Mass. Stat. March 15, 1805, act 21, sect. 4.
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shall sentence and order, according to the nature and aggravation of the offence.

XI. Of *felonious* assaults; and how punished.

Besides simple assaults, there are what the law denominates *felonious* assaults; and these derive the epithet annexed to them, from that atrocity of intention, with which they are committed.

1. Such an assault with a dangerous weapon, or other actual violence, and with an intent to *rob* or *steal*, subjects the offender, and any person present, aiding and assisting therein, or who shall have counselled or procured the same to be done, to solitary imprisonment for a term not exceeding one year; and afterwards to confinement to hard labour for a term, not exceeding ten years.

Mass. Stat. Mar. 16, 1805, act 19, sect. 9.

With intent to rob or steal.

2. If committed with a dangerous weapon, and with an intention to *murder* or to *maim or disfigure*; in such case, the offender, and any person present, aiding or abetting therein, and any one who, not being present, shall have counselled, hired, or procured the same to be done; all these are punished by solitary imprisonment for a term not exceeding six months, and by confinement afterwards to hard labour, or by imprisonment in the common gaol, for a term not exceeding four years.

Mass. Stat. March 15, 1805, act 21, sect. 5.

With intent to murder, maim, or disfigure.

3. If committed with an intention to commit a *rape*; in such case, it is provided, by statute, that if any man with such intention, shall make an assault upon a woman, or female child, every such offender, and any person who shall consent, aid, or assist therein, shall be punished by solitary imprisonment for a term, not exceeding three months, and by confinement afterwards to hard labour, for a term, not exceeding ten years;—or by a fine, not exceeding five hundred dollars, and by imprisonment in the common gaol, for a term, not exceeding one year, according to the aggravation of the offence.

Mass. Stat. Mar. 13, 1806, act 2, sect. 3.

With intent to commit a rape.

It is somewhat remarkable, that our legislature have made an assault, with an intent to *murder*, less penal than an assault, with an intent to *steal*.

The offence of a felonious assault is exclusively within the jurisdiction of the supreme judicial court.

What court has cognizance of felonious assaults.

TITLE XV.

ASSESSORS.

1st. Of the choice of assessors; and how they are sworn

2d. Proceedings in case of an assessor's refusal to serve in such office; and the penalty he thereby incurs.

3d. In what cases selectmen are assessors, *ex officio.*

4th. Proceedings in case any town or district neglect to choose either selectmen or assessors; and the penalty which the town or district thereby incurs.

5th. Liability of plantations, in case of neglect to choose assessors; and the proceedings in such case.

6th. Of the power and duty of assessors of parishes and precincts, relative to calling parish and precinct meetings.

7th. Proceedings in case neither the selectmen nor assessors, chosen by any town or district, will accept the trust; or where, having accepted the trust, they will not perform their official duty.

8th. Of the power and duty of assessors, previous to their making assessments.

9th. Of their general power and duty, in the act of assessment.

10th. Of their power and duty relative to taxes, assessed for the erecting or repairing of school-houses.

11th. Of their power and duty relative to taxes, assessed for the support of public worship.

12th. Of their power and duty relative to taxes assessed for the support of highways.

13th. Of their power and duty relative to the abatement of taxes; and herein of the remedy for the aggrieved party in case of refusal on the part of the assessors.

14th. Of their power and duty in relation to collectors of taxes, when such collectors are taken on a treasurer's execution.

15th. Of their power and duty in relation to such collectors, as, from insanity or infirmity, are unable to discharge their duty: Also, their power and duty, in case of the decease of a collector.

16th. Of their power and duty, on failure of a deficient collector to satisfy a warrant of distress, issued against him by the treasurer and receiver-general; and herein, of their liability for the neglect of such duty.

17th. Of their power to issue a new warrant for the collection of taxes, in case a former one be lost; or when a new collector is chosen.

18th. Of their compensation.

19th. Proceedings in case assessors neglect to obey the warrants of the treasurer and receiver-general; and their liability in such cases.

20th. Proceedings in case the estates of assessors shall be insufficient to satisfy a tax, to the payment of which, by official delinquency, they have rendered themselves liable.

I. Of the choice of assessors; and how they are sworn.

1. By Towns and Districts. In the month of March, annually, at the same meeting, when other town and district officers are chosen by the respective towns and districts in this commonwealth, there shall be chosen, by the qualified voters then present and voting, or the major part of them, three, five, seven, or nine meet persons, to be assessors of all such rates and taxes as the general court shall order and appoint such town or district to pay, towards the charges of the government, within the space of one year from the choice of such assessors, unless the warrant for the assessment shall not be by them received before the first day of March succeeding; and in case of its being received afterwards, it shall be delivered to their successors in office, who shall be under the same obligations to make the assessment as their predecessors would have been under, if they had seasonably received the same; who shall also be the assessors of county, town, and district taxes.

Mass. Stat. Feb. 20, 1786, act 1, sect. 1.

Number of assessors to be chosen.

Their obligations to make assessments according to law.

Number of assessors to be chosen.

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For form of oath see Append. No. II.

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3. By Plantations

Mass. Stat. Feb. 16, 1786, sect. 10.

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Warrant of the justice for warning the inhabitants, &c.

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Obedience to the warrant required.

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Penalty for refusing obedience to such warrant; and how the same is recoverable.

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choose a moderator and clerk, as also ASSESSORS and collectors, for assessing and collecting such plantation's proportion of such state and county tax, as shall be ordered to be assessed, to be duly paid, when collected by such collectors, to the state or county treasurers respectively; and such clerk, ASSESSORS, and collectors, shall be under oath, to be administered by the moderator of such meeting, for the faithful discharge of their respective trusts, and shall have the same allowance from such plantations, as such officers are entitled to by law in towns corporate.

Power of inhabitants to choose assessors, &c.

Assessors, &c. to be under oath.

Their compensation.

The same statute provides, that the assessors, who shall, from time to time, be chosen or appointed for such plantation, shall have power, and they are required to issue their warrants for calling meetings of the inhabitants there, in the month of March, annually, for choosing such officers as aforesaid, who shall be sworn by the moderator, or some justice of the peace, as aforesaid.

Mass. Stat. Feb. 16, 1786, sect. 12.

Powers of assessors, thus chosen, to call future meetings.

The same statute further provides, that every moderator of a plantation meeting shall be held and obliged to notify the plantation officers to appear either before himself, or some justice of the peace, within seven days from the time of their being chosen, and take the necessary oaths; and, in case of neglect, shall forfeit and pay the sum of *three pounds*, for the use of the plantation, to be recovered by any inhabitant thereof, before any justice of the peace within the same county.

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Moderator to summon assessors to appear, and take the necessary oaths.

Forfeiture for neglect.

By a subsequent statute, it is enacted, that all plantations which shall, from time to time, be ordered by the general court to pay any part or proportion of the public taxes, are fully vested with all the powers that towns in this commonwealth by law are; so far as relates to the choice of assessors of taxes.

Mass. Stat. Feb. 20, 1786, act 1, sect. 12.

Further power of plantations to choose assessors.

II. Proceedings in case of an assessor's refusal to serve in such office; and the penalty he thereby incurs.

In regard to assessors, chosen by a town or district, it is provided, that if any assessor, after being chosen and notified to take the oath of assessor, in the way and manner other town officers are notified and summoned, shall neglect to appear, or, appearing, shall refuse to be sworn; he shall

Mass. Stat. Feb. 20, 1786, act 1, sect. 1.

Forfeiture in case an assessor of any town or district refuse to be sworn.

forfeit and pay the sum of *five pounds*, for the use of the poor of the town or district respectively; to be recovered by their respective treasurers, before the court of general sessions of the peace, for the county in which such town or district lies, by complaint.

Mode of recovery.

Vid. Append. No. III.

The form of this complaint is prescribed by statute.

Mass. Stat. Feb. 20, 1786, act 1, sect. 1.

Power, however, is given by statute to the court of general sessions of the peace, upon reasonable excuse made to them by any assessor that shall refuse to accept as aforesaid, to remit, if they see cause, the penalty aforesaid.

Power of the sessions to remit the penalty.

Mass. Stat. Feb. 20, 1786, act 1, sect. 1.

And the selectmen of every such town or district, when any one or more of the assessors, so chosen, shall refuse as aforesaid, shall forthwith, after notice thereof, summon a meeting of the qualified voters of such town or district, to choose an assessor or assessors, in the room of such assessor or assessors so refusing; which voters, so assembled, shall accordingly choose so many assessors as shall be wanting to complete the number, which the town or district, at the time of the first choice, voted should be elected.

In case a town or district assessor, chosen, refuse to serve, duty of selectmen to call a meeting for the choice of other assessors.

Voters to choose so many as may be wanting to complete the number.

Mass. Stat. Feb. 20, 1786, act 1, sect. 12.

In regard to assessors, chosen by plantations, it is enacted, that any person who shall be chosen to the office of assessor of taxes, in any plantation, and shall refuse to accept the office to which he shall have been elected, or neglect to take the oath by law required to be taken by assessors of taxes in towns, shall be liable to the same penalties, to be recovered in the same way and manner, as is provided in the case of assessors refusing to accept such office when chosen by towns.

Forfeiture in case assessors of plantations, chosen, refuse to take the necessary oaths.

Modes of recovery.

III. In what cases selectmen are, *ex officio*, assessors.

Mass. Stat. Feb. 20, 1786, act 1, sect. 2.

If any town or district shall not choose assessors, or if so many of them, so chosen, shall refuse to accept, so that there shall not be such a number of them as any town or district shall vote to be the assessors thereof; then the selectmen of such town or district shall be the assessors thereof; and every one of them shall be sworn to the faithful discharge of their trust.

IV. Proceedings, in case any town or district neglect to choose either selectmen or assessors; and the penalty which the town or district thereby incurs.

If any town or district shall neglect to make choice of selectmen, or assessors, the said default being made known to the court of sessions within the same county; such town or district shall forfeit and pay a sum not exceeding *one hundred pounds*, nor less than *thirty pounds*, as the court of sessions shall order, for the use of the commonwealth; and in such case, (as also where neither the selectmen nor assessors, chosen by any town or district, shall accept the trust, or, having accepted the trust, shall not perform their duty) the court of sessions, in the same county, are empowered to nominate and appoint three or more sufficient freeholders, within such county, to be assessors of the rates or taxes in such town or district, as aforesaid; which assessors, so appointed, after being duly sworn, shall assess the polls and estates, within such town or district, their due proportion of any tax; according to the rules set down in the act for raising the same; together with the aforesaid penalty, where the town or district makes default as aforesaid, and such additional sum as shall answer their own reasonable charges, for time and expense in the said service, not exceeding *ten shillings* per day for each man so employed; and, having made such assessment, shall issue a warrant, under their hands and seals, for collecting the same, and transmit a certificate thereof to the treasurer, with the name of the constable, collector, sheriff, or his deputy, to whom they shall commit the same to be collected; and such assessors shall be paid their charges as abovesaid, (the same being adjusted and certified by two or more justices of the court by whom they were appointed assessors, under their hands,) out of the public treasury, by warrant from the governor, with the advice and consent of council.

Mass. Stat. Feb. 20, 1786, act 1, sect. 3.

Penalty incurred by a town or district, which neglects to choose selectmen or assessors.

In such case, &c. the sessions to appoint assessors.

Power of assessors thus appointed by the sessions.

Their compensation.

By a subsequent statute, it is further provided, that if the inhabitants, qualified to vote in town affairs, of any town, district, or plantation, in this commonwealth, from which any state or county tax shall be required, shall neglect, for the space of five months after having received the warrant of the treasurer, for assessing any state tax, to choose assessors to assess the same, and cause the assessment thereof to be certified, as the law requires, to the

Mass. Stat. Feb. 25, 1800, act 2, sect 1.

Where any town, district, or plantation, neglects to elect assessors for the space of five months, after having received the treasurer's warrant for the assessment of any state tax—in such case, the treasurer

may issue his warrant to have the amount of such tax collected by distress and sale of the property of any inhabitant of such deficient town, &c.

treasurer of the commonwealth, for the time being, and agreeably to his warrant, directing the same; he is authorized and directed to issue his warrant, under his hand and seal, directed to the sheriff of the county, or his deputy, requiring him to levy and collect, by distress and sale, the sum mentioned therein, of the estates, real and personal, of any inhabitant or inhabitants of such deficient town, district, or plantation; which warrant the said sheriff, or his deputy, is empowered and required to execute; observing the same rules and regulations as are, by law, provided for satisfying warrants against deficient collectors of public taxes: And it shall be the duty of the said sheriff, or his deputy, on receiving the said warrant, forthwith to transmit an attested copy thereof to the selectmen, or clerk of the town, district, or plantation, named therein; and if the assessors shall, within sixty days from the receipt of such attested copy, deliver to the said sheriff, or his deputy, a certificate according to law, of the assessment of the tax or taxes required by said warrant, and pay the officer his legal fees, he shall forthwith transmit the same certificate to the said treasurer, and return the warrant unsatisfied.

The officer's duty to whom such warrant is directed.

In what case the officer may return such warrant unsatisfied.

Mass. Stat. Feb. 25, 1800, act 2, sect. 2.

Treasurer directed to issue a similar warrant, where the qualified voters of any town, district, or plantation neglect to choose and keep in office assessors, &c.

The same statute further provides, that if the inhabitants, qualified to vote in town affairs, of any town, district, or plantation, in this commonwealth, from which any state or county tax shall be required, shall neglect to choose, and keep in office, assessors to assess the same, as the law requires; the treasurer of the commonwealth, or of the county, for the time being, is authorized and directed to issue his warrant, under his hand and seal, directed to the sheriff of the county, or his deputy, requiring him to levy and collect the sum mentioned therein, in manner aforesaid. And the sheriff aforesaid, or his deputy, shall execute said warrant, observing all the rules and regulations, and all the provisions mentioned aforesaid.

Duty of the officer to whom such warrant is directed.

V. Liability of plantations, in case of neglect to choose assessors; and the proceedings in such case.

Act 1, sect. 13.

By statute, Feb. 20, 1786, it is provided, that if any plantation shall neglect to choose assessors, or if the assessors chosen by any such plantation, and accepting such

trust, shall be remiss or neglect their duty ; in every such case, such plantation shall be subject to the same penalties, and be proceeded with in the same manner as, by the same act, is provided in the case of deficient towns.

As to the statute of Feb. 25, 1800, quoted under the preceding head, no distinction is made therein, between towns and plantations ; but the provisions of the statute apply equally to both. So that now a plantation which pays public taxes, and neglects to choose assessors, is liable to the same penalties, and must be proceeded with in the same manner, as in the case of a town which thus neglects.

VI. Of the power and duty of assessors of parishes and precincts, relative to calling parish and precinct meetings.

Mass. Stat. June 28, 1786, act 2, sect. 2.

Committee and assessors of parishes have the same power for calling parish meetings, as selectmen have for calling town meetings.

Duty of such assessors in regard to warrants for calling a meeting.

Assessors of parishes or precincts are empowered to manage their prudentials, unless a committee shall be specially appointed for that purpose, which any precinct or parish is empowered to choose, if they think proper ; and the said committee, where any such shall be chosen, and the assessors, where no such committee shall be appointed, shall have like power and authority in all respects for calling parish or precinct meetings, as selectmen by law have, for calling town meetings. And when ten or more of the qualified voters of any precinct or parish shall signify in writing, their desire to have any matter or thing inserted in a warrant for calling a meeting, it shall be the duty of the assessors to insert the same in the next warrant they shall issue for that purpose.

Mass. Stat. June 28, 1786, act 2, sect. 2.

In what cases a justice of the peace is authorized to call such meetings.

And in case the assessors shall unreasonably refuse to call a meeting, or a parish or precinct shall have no assessors within it to call one, or not a major part of the assessors or committee which any parish may agree upon to be chosen, any justice of the peace for the same county, upon the application of ten or more of the voters in the parish or precinct, may call a meeting, in the same manner as a justice of the peace is by law authorized to call a town meeting.

VII. Proceedings, in case neither the selectmen nor assessors, chosen by any town or district, will accept the

trust; or where, having accepted the trust, they will not perform their official duty.

Mass. Stat. Feb. 20, 1786, act 1, sect. 3.

Where neither the selectmen nor assessors, chosen by any town or district, shall accept the trust, or, having accepted the trust, shall not perform their duty; in such case the court of sessions, in the same county, are empowered to nominate and appoint three or more sufficient freeholders, within such county, to be assessors of the rates or taxes in such town or district; which assessors, thus appointed, after being duly sworn, are vested with the same powers, for the same purposes, and receive the same compensation, as assessors appointed by the sessions, in cases where a town or district neglect to *choose* either selectmen or assessors.

VIII. Of the power and duty of assessors, previous to their making assessments.

Mass. Stat. Feb. 20, 1786, act 1, sect. 9.

The assessors of each town, district, plantation, precinct, and parish, respectively, in convenient time, before they proceed to make any assessment, shall give seasonable warning to the inhabitants, at any of their respective meetings, or by posting up notifications in some public place in said town, district, plantation, precinct, or parish, as the case may be, or notify the respective inhabitants in some other way, to make and bring in to them, the said assessors, true and perfect lists of their polls, and of all their estates, both real and personal, (saving such estate as is, or may by law be, exempted from taxation) which they were possessed of, at such periods as the general court may, from time to time, order and direct; and if any person or persons shall not bring in a list of their estate, as aforesaid, to the assessors, he, she, or they, so neglecting, or refusing, shall not be admitted to make application to the sessions, for any abatement of the assessment so laid on him, her, or them; unless such person or persons shall make it appear to said court, that it was not within the power of him, her, or them, to deliver to the assessors, respectively, a list of his, her, or their rateable estate at the time appointed for that purpose.

Duty of assessors to notify persons to exhibit to them true lists of their polls and estates.

Those who neglect to bring in such lists, are not admitted to apply to the sessions for an abatement of their taxes, unless such neglect resulted from necessity.

Mass. Stat. Feb. 20, 1786, act 1, sect. 9.

And if the assessors suspect any falsehood in the list to them presented, of polls or estates as aforesaid, then the said assessors, or either of them, shall require the person

presenting such list, to make solemn oath, that the same is true; which oath, the assessors, or either of them, are empowered to administer; and such list, being exhibited on oath, shall be a rule for that person's proportion of the tax, who presented the same, which the assessors may not exceed, unless they shall discover any error therein; in which case, the assessors are authorized and directed to assess such articles as appear to be kept back.

Where the assessors suspect any falsehood in the list presented, they are empowered to administer an oath to the person presenting the same.

Such list, when sworn to, to be received as true, unless some error be detected therein.

IX. Of their general power and duty, in the act of assessment.

1. Assessors, chosen by towns and districts, are directed to assess the polls of, and estates within, such town or district, their due proportion of any tax, according to the rules set down in the act for raising the same, and make perfect lists thereof under their hands, or the hands of the major part of them, and commit the same to the constable or constables, collector or collectors, sheriff or his deputy, with a warrant under their hands and seals, in the form directed by the statute, and return a certificate thereof to the treasurer or receiver-general of this commonwealth, for the time being, with the name of the constable or constables, collector or collectors, sheriff or his deputy, to whom they shall have committed the same assessment, with the warrant as aforesaid to collect; and the said assessors shall also have their assessment recorded in the town or district book, or leave an exact copy thereof, by them signed, with the town or district clerk, or file such copy in the assessors' office, where any such is kept, before the same shall be committed to a constable or collector, the sheriff or his deputy, to collect; and at the same time shall lodge in the said clerk's office, the invoice or valuation, or a copy thereof, from whence the rates or assessments are made, that the inhabitants, or others rated, may inspect the same.

Mass. Stat. Feb. 20, 1786, act 1, sect. 1.

Town and district assessors to make assessments according to law, and, after having made perfect lists thereof, to commit the same to an officer for collection.

Their duty to return a certificate thereof to the treasurer.

Such assessment to be recorded; or a copy to be left with the town or district clerk; or such copy to be filed in the assessors' office, before the same be committed for collection. Also the valuation, or a copy thereof, to be lodged in the said clerk's office.

2. The same statute further provides, that all county, town, district, precinct, plantation, and parish taxes and rates, shall be assessed and apportioned by the assessors of the several towns, districts, plantations, precincts, and parishes within this commonwealth, upon the polls of, and estates within the same, according to the rules that shall,

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County, town, district, plantation, and parish taxes, to be assessed according to the last tax act.

from time to time, be prescribed and set, in and by the then last tax act of the general court.* And such assessors shall cause attested copies of such assessments and valuations to

* The *tenant*, in the actual occupation of land, is liable to be assessed for it in parish taxes, and not the *owner* of the land, who lives in *another* town.

As in the case, Martin *vs.* Mansfield & al., 3 Mass. T. R. 419, which was trespass, for taking, and carrying away the plaintiff's chaise, &c. The defendants pleaded specially, and justified under certain proceedings, as assessors of the first parish of Lynn; that the plaintiff was assessed in a certain sum, by reason of his being the owner of certain real and personal estate in said parish of Lynn; that the plaintiff refused to pay the sum, so assessed; wherefore, one Mansfield, (the collector of said parish, to whom the defendants had committed their warrant, for the collection of said sum, so assessed) distrained the plaintiff by his said chaise, &c., which is the trespass complained of. The plaintiff replied, that, at the time, &c., he was, &c., an inhabitant of the town of Marblehead, and not an inhabitant of the town of Lynn; and that, at the several times, &c., he was the owner of the messuage and farm in question, together with the household furniture, and implements of husbandry, and stock, thereto belonging; and that, at the several times, &c., said messuage, furniture, &c., were in the actual occupation and tenancy of one Abraham Kimball, as plaintiff's lessee, from year to year, so long as the parties should please; the said Kimball yielding and paying therefor, one half of the annual produce and profits of the demised premises;—which said tenements and property are the same, &c., without this, &c. To this replication there was a demurrer; and the replication was adjudged good.

In this case, the opinion of the court was delivered as follows, by Sedgwick, J.

Assessors are to make the apportionment of their taxes according to the rules, prescribed in the next preceding tax act of the legislature; and in the tax act passed in 1804, by which the defendants should have governed themselves, the assessors were directed to assess for real estate, by three descriptions:—First, to assess on the inhabitants of the town, &c. respectively, according to the just value of the real estate *possessed* by each inhabitant of such town, &c., on the first day of May, in his, her, or their own right, or in the right of *others*, lying within such town, &c. According to this direction, it was the duty of the assessors to tax all the land, actually *possessed*, to the person *possessing* the same. And as the land, for which the plaintiff was taxed, was then actually

be lodged in the clerk's office of the place where the same are made, or file the same in their own office, if any such they have.†

Copies of such assessments and valuations to be lodged in the clerk's office; or filed in the assessors' office.

3. The assessors for any town, district, plantation, precinct, or parish, are authorized, from time to time, to ap-

Mass. Stat. Feb. 20, 1786, act 1, sect. 11.

possessed by his *tenant*, and not by him, it could not be legally charged to him.

The second description of real estate, to be taxed, is in these words; "upon the owners of real estate in such town, &c., whether such owners reside within the same town or not, upon the said first day of May." This provision was manifestly intended to apply to such real estate, of which there is a good deal in this commonwealth, which is, part of the year, actually possessed, and part of the year vacant; and authorized an assessment of it to the proprietor, although he might not be in the *actual* occupation, on the first day of May.

The third description is of the proprietors of non-resident real estate; and this extends, as the terms import, to proprietors of land and real estate, who do not reside within the town, &c. where it lies; and to real estate, which is not in the *actual* occupation of a *resident* within the town.

As to the personal estate of the plaintiff, if it could have been taxed to him at all, it must have been done by the town and parish, where he was an inhabitant.

† Assessors of parishes must make a list and valuation of the taxable property, before assessing a tax, or the assessment will be illegal and void. For, *per curia*, in the case Thurston vs. Little & al., 8 Mass. T. R. 429; the public revenue of this commonwealth arises principally, and that of towns and parishes arises wholly, from assessments upon polls, upon the value of property possessed by the citizens, and upon their income from their several occupations and employments; and not, as in most other countries, by taxes upon certain specific articles. This value can only be ascertained, for the purpose of assessments, from the returns to be made by the persons liable to taxation, and, in case of their failure or neglect, by an estimate to be made by the assessors, known, in our country, by the word *dooming*. In whichever of these modes the result is obtained, it is equally required by law, that a list and valuation of each individual's taxable property be made and preserved for the inspection of all interested in the assessment. This furnishes a considerable check on the assessors, and affords a protection to the citizens against prejudice, partiality, or inattention.

Assessors empowered to apportion on the polls, &c. an additional sum, over and above the precise sum to them committed to assess.

portion on the polls and estates, according to law, such additional sum, over and above the precise sum to them committed to assess, as any fractional divisions of such precise sum may render convenient, in the apportionment thereof; not exceeding five per cent. on the sum taxed Provided, the whole excess shall, in no case, amount to more than the sum of *forty pounds*, the surplus sum shall be paid into the treasury of such town, district, plantation, precinct or parish, and shall be subject to the order and disposal of such town, plantation, precinct, district, or parish; and it shall be the duty of such assessors, to certify such town district, plantation, precinct, or parish treasurer, thereof.

The surplus sum to be paid into the treasury.

Assessors to certify the town of such payment.

Mass. Stat. Feb. 20, 1786, act 1, sect. 14.

4. And whereas the county tax may often be so small, that it would be inconvenient to make a separate list of each person's proportion of it; it is therefore provided, that, in such case, it shall be lawful for the assessors of any town, district, or plantation, to add their proportion of the county tax to any of their other taxes, and make out warrants and certificates accordingly.

Assessors may add the county tax to other taxes.

X. Of their power and duty relative to taxes, assessed for the erecting or repairing of school-houses.

Mass. Stat. Feb. 28, 1800, act 3, sect. 2

For these purposes, every man shall be taxed in the district in which he lives, for all the estate he holds in the town, being under his own actual improvement; and all other of his real estate, in the same town, shall be taxed in the district in which it is included; and lands, when the owner thereof lives without the town, shall be taxed in such district as the assessors, having regard to the local situation thereof, shall appoint;* and it shall be the duty of the assessors, before they assess a tax for any district, to determine in which district such lands respectively shall be taxed, and to certify, in writing, their determination to the clerk

In what district, and for what estate, persons shall be taxed.

Duty of assessors to determine in what district certain lands shall be taxed; and to certify the same.

Such certificate to be recorded.

* Monies voted to be raised by the inhabitants of a school district, for the erecting of a school-house, may be assessed by assessors chosen after such vote. *Pond v. Negus & al.* 3 *Mass. T. R.* 230.

So also the inhabitants of a school district, having voted to raise monies for erecting a school-house, may afterwards, and before the same are assessed, rescind such vote at their discretion. *Pond v. Negus & al.* 3 *Mass. T. R.* 230.

of the town, who shall record the same; and such land, while owned by any person, residing without the limits of the town, shall be taxed in such district, until such towns shall be districted anew: Provided however, that all the lands within any town, owned by the same person not living therein, shall be taxed in one and the same district.

What lands shall be taxed in the same district.

And the assessors shall assess, in the same manner as town taxes are assessed, on the polls and estates of the inhabitants composing any school districts, and on lands in said town, belonging to persons living out of the same, which the assessors shall have directed to be taxed in such district, all monies voted to be raised, by the inhabitants of such district, for the purposes aforesaid, in thirty days after the clerk of the district shall certify to said assessors the sum voted, by the district, to be raised as aforesaid.†

Mode of assessment.

Time of assessment.

And it shall be the duty of said assessors to make a warrant, in due form of law, directed to one of the collectors of the town to which such district belongs, requiring and empowering said collector to levy and collect the tax so assessed, and to pay the same, within a time to be limited in said warrant, to the treasurer of the town; to whom a certificate of the assessment shall be made by the assessors.

Assessors to issue their warrant for the collection of such taxes.

Such taxes, when collected, to be paid into the treasury.

A certificate of the assessment to be made to the treasurer.

† It is not necessary that such assessment be made within thirty days from the date of the certificate of the district clerk; for there are no negative words restraining them from making the assessment afterwards: And accidents might happen, which would defeat the authority, if it could not be exercised after the expiration of thirty days. The naming the time for the assessment must be considered, therefore, as directory to the assessors, and not as a limitation of their authority. *By the court, in the case Pond v. Negus & al.* 3 *Mass. T. R.* 230.

So also if an illegal assessment of such monies be made, the same, or succeeding assessors, may make a new assessment, for which purpose, the district clerk may issue a second certificate: For the first certificate may be lost, mislaid, or destroyed by accident before the assessment is made; and it would be unreasonable to decide, that he could not make a second certificate in that case, that the assessors may have, in their possession, a document necessary to justify them in proceeding. *By the court, in the case Pond v. Negus & al.* 3 *Mass. T. R.* 230.

At whose disposal is the money, thus collected.

And the money so collected and paid, shall be at the disposal of the committee of the district, to be by them applied for the building or repairing a school-house, in the district to which they belong. And such collector, in collecting such tax, shall have the same powers, and be holden to proceed in the same manner, as is by law provided in collecting town taxes.

Power of collectors.

Mass. Stat. Feb. 28, 1800, act 3, sect. 3.

The same statute further provides, that the treasurer of any town, to whom a certificate of the assessment of a district tax shall be transmitted as aforesaid, shall have the same authority to enforce the collection and payment of the money so assessed and certified, as if the same had been voted to be raised by the town for the town's use. And the treasurer and collector shall be paid the same commission on the money collected and paid, for the use of a school district aforesaid; and the assessors, for assessing said tax, shall be allowed, by the district, the same sum for each and every day while employed in assessing the same, as is allowed and paid by the town for similar services.

Power of the treasurer to enforce the collection of the money assessed.

Compensation allowed to the treasurer, collector, and assessors.

XI. Of their power and duty, relative to taxes assessed for the support of public worship.

Mass. Stat. Mar. 4, 1800, act 19, sect. 4.

Every town, parish, precinct, district, and other body politic, and religious society, is authorized to cause all sums of money, by them respectively voted to be raised from time to time, in any legal meeting duly assembled and holden for that purpose, for the settlement or support of any public teacher or teachers of religion, or the building or repairing any house or houses of public worship, to be assessed on all the rateable polls and property within each particular corporation or religious society aforesaid, (the polls and estates of Quakers excepted) in the same proportion as state or town taxes are, by law, assessed.

Mode of assessment.

When collected, the money to be paid into the treasury.

And such sums of money, when so assessed and collected, shall be paid into the treasury of such town, if composed of one parish or society; if otherwise, to the treasurer of the parish, precinct, district, or other body politic, or religious society aforesaid, to be by him paid out as directed and ordered by the selectmen of such town or district com-

How such money is to be paid out by the treasurer.

mittee (where chosen) or otherwise by the assessors of such parish, precinct, and other body politic, or religious society, for the purposes for which such money was raised.

A person taxed, and belonging to a different denomination, may request that his tax be applied to the support of his own teacher.

Provided, however, that when any person, taxed in any such tax or assessment, voted to be raised as aforesaid, for the purposes aforesaid, being, at the time of voting or raising any such tax or assessment, of a different sect or denomination from that of the corporation, body politic, or religious society, by which said tax was so assessed, shall request that the tax, set against him or her, in the assessment made for the purposes aforesaid, may be applied to the support of the public teacher of his or her own religious sect or denomination; such person, procuring a certificate, in substance as is prescribed by statute, signed by the public teacher on whose instruction he usually attends, and by two other persons of the society of which he is a member, (having been specially chosen a committee to sign said certificate;) and having produced said certificate to the selectmen, committee, or assessors (as the case may require) of the town, district, parish, precinct, or other body politic, or religious society, by whom he or she has been taxed as aforesaid, it shall be sufficient to require them respectively to order and direct the treasurer of such corporation or religious society, to pay over the amount of such taxes, so applied for, to the use of the public teacher of the religious sect or denomination to which such applicant belongs; and such public teacher shall thereby be entitled to receive the same.*

In such case, he must produce a certificate of his usual attendance on such teacher.

For form of certificate see Append. No. IV.

Such certificate shall intitle him to such application of his tax.

Such teacher entitled to receive it.

The statute has further provided, that the assessors of each parish or religious society, within the commonwealth, may omit, in the taxes voted to be assessed on the polls and estates within such parish or society, such persons, living within the limits of the same, as belong to, and usually attend public worship in a religious society of a different denomination.

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Assessors may omit to assess such persons as belong to a different denomination.

XII. Of their power and duty relative to taxes assessed for the support of highways.

* For further information on this subject, see title ASSUMPSIT, under the head of MONEY HAD AND RECEIVED.

Mass. Stat. Mar. 5, 1787, sect. 3.

Towns directed to raise money for the support of highways.

Mode of assessment.

Assessors' list to the surveyor.

Surveyor to render to the assessors a list of deficient persons.

Each town, at some public meeting of the inhabitants thereof, regularly notified and warned, shall vote and raise such sum of money, to be expended in labour and materials on the highways and townways, as they shall determine necessary for the purpose: And the assessors shall assess the same on the polls and rateable estate, personal and real, of the inhabitants, residents, and non-residents of their town, as other town charges are by law assessed, and deliver to each surveyor a list of the persons, and the sums at which they are severally assessed for his limits. And the surveyor, at the expiration of his term, shall render to the assessors, for the time being, a list of such persons as shall have been deficient (if any such there be) in working out their highway rate; or otherwise paying him the sum assessed therefor; which deficient sums shall, by the assessors, be put in a distinct column, in the next assessment for the town-tax, and collected by the constable or collector thereof, as other town-taxes are collected, and paid into the town treasury, for the use of the town.

Deficient sums to be put in a distinct column in the next assessment for the town tax, and collected.

Mass. Stat. Mar. 5, 1787, sect. 2.

Assessors to appoint to surveyors their several limits.

It is further provided by statute, that the selectmen or assessors of each town shall assign and appoint in writing, annually, to the surveyors, their several limits and divisions of the highways and townways, for repair and amendment, to which assignments the said surveyors are directed to observe and conform themselves.

XIII. Of their power and duty relative to the abatement of taxes; and herein of the remedy of the aggrieved party, in case of refusal on the part of the assessors.

Mass. Stat. Feb. 20, 1786, act 1, sect. 10.

Application to the assessors for abatement of taxes.

Assessors to make abatement, if reasonable.

Application to the sessions on refusal of the assessors.

If any person or persons shall, at any time, be aggrieved at the sum or sums set and apportioned upon him or them, by the assessors of any town, district, plantation, or parish, and shall make it appear to the assessors, for the time being, of such town, district, plantation, or parish, that he or they are rated more than his or their proportion, according to the rule given in the act or acts of the general court, for making the said assessment; in such case, the said assessors, for the time being, shall make a reasonable abatement to the person or persons so aggrieved; and if they shall refuse so to do, such person or persons, com-

plaining in writing to the next court of sessions, within that county, and making it appear that he or they are overrated, as abovesaid, he or they shall be relieved by the said court, and shall be reimbursed out of the treasury of the town, district, plantation, or parish, where such assessment was made, so much as the said court or assessors, respectively, shall see cause to abate him or them, with the charges; and the said court of sessions are empowered, on such complaint being made, to require the assessors, or clerk, to produce the valuation by which the assessment is made, or a copy thereof.

In what cases the sessions may grant relief.

Sessions empowered to require of the assessors or clerk, the valuation, or a copy thereof.

If, however, any person or persons shall not bring in to the assessors a list of their estates, as directed by the ninth section of the same statute, he, she, or they, so neglecting or refusing, shall not be admitted to make application to the court of sessions, for any abatement of the assessment so laid on him, her, or them; unless such person or persons shall make it appear to said court, that it was not within the power of him, her, or them, to deliver to the assessors, respectively, a list of his, her, or their rateable estate, at the time appointed for that purpose.

In what case the right of applying to the sessions for abatement of taxes is taken away.

XIV. Of their power and duty in relation to collectors of taxes, when such collectors are taken on a treasurer's execution.

Whenever a constable or collector of any town, district, plantation, parish, or precinct, shall be taken on a treasurer's execution, by virtue of the statute of Feb. 16, A.D. 1786, it shall be lawful for the assessors of such town, district, plantation, parish, or precinct, for the time being, if they see fit, to demand and receive of the constable or collector, taken as aforesaid, a true copy of any or all the assessments, which, as constable or collector aforesaid, he had in his hands unsettled, at the time of being taken as aforesaid, with the whole evidence of all payments on the assessments demanded as aforesaid; and in case the said constable or collector, taken as aforesaid, shall, upon being demanded thereto, deliver up to the said assessors, all the assessments, which he, as constable or collector as aforesaid, shall have in his hands unsettled,

Mass. Stat. Feb. 16, 1786, sect. 14.

Where a collector is taken on a treasurer's execution; in such case the assessors may demand of such collectors a copy of the assessments in his hands unsettled, with evidence of all payments on such assessments.

Upon compliance of the collector with this demand of the assessors, he shall receive due credit.

together with the whole evidence of all payments on the assessments demanded as aforesaid, then the said constable or collector shall receive such credit as the said assessors, from an inspection of his assessments, shall adjudge him entitled to; and the said constable or collector, taken as aforesaid, shall be holden for the payment of such sum or sums of money, as he shall be found deficient, after being credited as aforesaid.

The collector holden for the balance due from him.

And the same town, district, plantation, parish, or precinct, may proceed to the choice of another collector, at any other time besides the annual meeting in March, to finish the collections on the same assessments, who shall be sworn to the faithful discharge of his office; or if he shall refuse or neglect to accept the said office, or refuse to be sworn as aforesaid, he shall incur the penalty, which constables by law will incur for refusing or neglecting to be sworn, or to serve in the office of constable. And the assessors, for the time being, respectively, on receiving the assessment as aforesaid, shall make and deliver to the same collector, chosen and sworn as aforesaid, a warrant or warrants, for finishing the collections last aforesaid, in the form by law prescribed, (*mutatis mutandis*) and the same collector shall proceed to finish such collections, in the same manner as constables, or other collectors, are to proceed in collecting like species of rates or taxes.

In such case, another collector to be chosen.

Penalty, in case the collector chosen refuses to be sworn.

Assessors to deliver to the new collector a warrant for finishing the collections.

Power of the new collector.

And if any constable or collector, taken as aforesaid, shall, on demand as aforesaid, refuse to exhibit and deliver up his assessments, with the evidence as aforesaid, he shall be forthwith, either by the officer taking him as aforesaid, or by warrant from some justice of the peace, committed to the common gaol of the county; there to remain until he shall exhibit the same for the purpose aforesaid.

The old collector to be committed, on his refusal to deliver up the assessments to the assessors.

At what time he may be released.

And the assessors of such town, district, plantation, parish, or precinct, are empowered to take the duplicate or copies of the records of such assessments, if the same are recorded, and the same copies to deliver to the collector, chosen as last aforesaid; who, having received the same, and a warrant therefor, shall proceed to finish the collection of the rates and taxes, in the same assessments mentioned, of the persons who did not pay the same to the constable or collector, taken as aforesaid.

Copies of the record of assessments to be delivered by the assessors to the new collector.

New collector to finish the collection.

Provided, however, that the collectors chosen to finish the collections aforesaid, on averment of payment by the person or persons assessed, to the constable or collector taken as aforesaid, and denial of payment to the collector for finishing the said collections, shall not proceed to distrain or imprison any person, unless a vote of such town, district, plantation, parish, or precinct, is first had therefor, and certified to the same collector by the clerk of such town, district, plantation, parish, or precinct.

New collector in certain cases not to distrain or imprison any person.

XV. Of their power and duty in relation to such collectors, as, from insanity or infirmity, are unable to discharge their duty: Also, their power and duty, in case of the decease of a collector.

It is provided by statute, that when any constable or collector of any town, district, plantation, precinct, or parish, who may become *non compos mentis*, and who may have a guardian duly appointed, or who may, by bodily infirmity, be rendered incapable of discharging the duties of his office, in the judgment of the assessors, before such insane or infirm constable or collector hath perfected his collection; the assessors shall thereupon procure and appoint in writing, under their hands, some suitable person as collector, to perfect such collection, and grant him a warrant for such purpose; and the person so appointed shall have the same power and authority, as were granted to such insane or infirm constable or collector.

Mass. Stat. Feb. 3, 1792, sect. 1.

Where a collector becomes insane or infirm, the assessors may appoint a new collector.

Power of the new collector.

Provided, however, that no person shall be appointed to complete the collection of such infirm collector, unless he shall request the same: Provided also, that when it shall appear to the assessors, that such insane or infirm constable or collector shall have paid to the treasurer or treasurers, to whom he was accountable, a larger sum or sums of money, than the amount of the monies that he has collected from the persons borne on his list of assessment, the assessors, in their warrant to the collector by them appointed, shall direct him to pay such sums as shall appear to them to be overpaid, as aforesaid, to the guardian of such insane constable or collector, or to such infirm constable or collector, as the case may be.

Proviso respecting the appointment of the new collector.

Duty of assessors, in case it shall appear that the insane or infirm collector has paid a sum of money into the treasury, larger than the amount of his collections.

In case a collector becomes insane, or infirm, or dies, before his collections are perfected, the assessors may demand a list of the assessment committed to him, and deliver the same to the collector, newly appointed.

And in the cases aforesaid, and in case of the decease of any constable or collector of taxes, before his perfecting his collection, the assessors, for the time being, shall have power to demand and receive the list or lists of assessments of and from such infirm constable or collector, or from the guardian of such constable or collector as shall be *non compos mentis*, or from the executors or administrators of any deceased constable or collector, or of and from any person, in whose hands the same may be, and to deliver the same to the collector newly appointed.

Mass. Stat. March 16, 1786, act 4, sect. 1.

In case a collector dies, the assessors may appoint a new collector.

Another statute has provided, that, in case any constable or collector of taxes decease before his perfecting the collection of any assessment committed to him to collect and pay into the state-treasury; the assessors, for the time being, of such town, district, or plantation, shall nominate and appoint, at the charge of such town, district, or plantation, some other fit person or persons to perfect the same collection, and enable and empower such person or persons to collect the same, by granting a warrant to him or them for that purpose.

Mass. Stat. Feb. 16, 1786, sect. 5.

If a collector dies, before having adjusted the account of his assessment, committed to him to collect, his executor or administrator is chargeable, and must settle with the assessors.

It is further provided, by another statute, that in case of the decease of any constable or collector, in any town, district, plantation, precinct, or parish, before his having adjusted the accounts of his assessment to him committed to collect, for such town, district, plantation, precinct, or parish; the executors or administrators of such constable or collector, shall, within two months after his decease, settle and make up accounts with the assessors of the said town, district, plantation, precinct, or parish, of such part of the assessment as was received and collected by the deceased constable or collector in his life time; with which, such executors or administrators shall be chargeable, in like manner as the deceased constable or collector should be, if living;

In such case, the assessors to appoint a new collector.

and such assessors shall, thereupon, procure and appoint, in writing, some suitable person, a collector to perfect such

Power of the new collector.

collection; and the person, so appointed, is empowered and required to execute all such powers as were granted to the deceased constable or collector.

And if the executors or administrators of any constable or collector, so deceased, not having fully collected the as-

sessment committed, shall fail of making up and settling the account of what was received by the deceased, as aforesaid, before the expiration of the time aforesaid, such executors or administrators shall be chargeable with the whole sum committed to their testator or intestate, in case there be sufficient assets, in the same manner the deceased constable or collector should be, if living.

Liability of the executor or administrator of such deceased collector, in case he neglects to settle with the assessors.

XVI. Of their power and duty, on failure of a deficient collector to satisfy a warrant of distress, issued against him by the treasurer and receiver-general; and herein, of their liability for the neglect of such duty.

If any constable or collector, so failing as aforesaid, have no estate to be found, whereon to make distress, and his person cannot be taken within the space of three months from the time a warrant of distress shall issue from the treasurer and receiver-general as aforesaid, or, being taken and committed to gaol, shall not, within three months, satisfy the same; in such case the town, district, or plantation, whose constable or collector so fails of his duty, shall within three months from the expiration of the said three months first mentioned, make good to the treasurer the sum or sums due or owing to the same, from such deficient constable or collector.

Mass. Stat. Feb. 16, 1786, sect. 5.

Towns, districts, and plantations liable to make good to the treasury any sum due thereto by a deficient collector, against whom a warrant of distress has issued.

And the assessors of such town, district, or plantation, having notice in writing from the treasurer, of the failure of any constable or collector as aforesaid, shall forthwith thereupon, without any other or further warrant, assess the sum the said deficient constable or collector is deficient, upon the inhabitants and estates of such town, district, or plantation, in manner as the sum so committed to such deficient constable or collector was assessed, and commit the same to some other constable or collector, with warrant to collect; and in default thereof, the treasurer of the commonwealth is directed and empowered to issue a warrant of distress against such deficient assessors, for the whole sum which may remain due from such deficient constable or collector, which shall be executed in the same manner as in the statute is prescribed, for serving other warrants of distress, which may be issued by such treasurer.

Upon notice from the treasurer of the failure of such deficient collector, it is the duty of the assessors to assess the sum in which the said collector is deficient, upon the polls and estates of the inhabitants.

Said assessment to be committed to some other collector for collection.

Liability of assessors who omit their duty in this particular.

Such deficient collector liable to the suit of the inhabitants.

Provided, however, that such constable or collector, failing of his duty aforesaid, for whose default the town, district, or plantation is answerable, as before expressed, shall, at all times, afterwards, be liable to the action or suit of the inhabitants, in their corporate capacity, for all such sum and sums as were assessed upon the same, through his defect, and for other damages occurring to them thereby.

XVII. Of their power to issue a new warrant for the collection of taxes, in case a former one be lost; or when a new collector is chosen.

Mass. Stat. Mar. 4, 1800, act 15.

Power of assessors to grant a new warrant for the collection of taxes, when a former one is lost, or accidentally destroyed.

It is provided, by statute, that the assessors, for the time being, of any town, district, parish, precinct, or other society by law empowered to raise money by taxes, whenever it shall be made to appear to them by any constable or collector of taxes in the town, or other such place or society as aforesaid, of which they are assessors, that an original or other warrant, issued and delivered to him for the collection of any certain tax committed to him, hath been lost or destroyed by accident, are empowered to issue a new warrant to such constable or collector for collecting the same, which shall have the same force and effect as the original warrant.

Mass. Stat. July 5, 1783, act 3, sect 1.

Power of assessors to grant a new warrant for the collection of taxes, where a collector has removed, or is about to remove from the commonwealth, and a new collector is chosen.

So also where a collector has removed, or is about to remove, from the commonwealth, and a new collector be chosen to succeed him; in such case the assessors shall make out a new warrant, under their hands and seals, in due form of law, and shall deliver the warrant, together with the same bill or bills, to the person chosen as aforesaid, to collect and levy what shall be remaining due thereon; and the person, so chosen, is vested with the same authority to levy and collect what shall then remain due on the same bill or bills, as the constable or collector was, to whom they were first committed.

XVIII. Of their compensation.

Mass. Stat. Feb. 20, 1786, act 1, sect. 2.

Each assessor shall be paid out of the town or district treasury, *four shillings* for each whole day he shall be necessarily employed in that service.

Ibid. sect. 3.

Upon default, however, of any town or district to choose selectmen or assessors, if, in such case, they are chosen by

the court of sessions, they shall be allowed a sum not exceeding ten shillings per day, for each man.

XIX. Proceedings in case assessors neglect to obey the warrants of the treasurer and receiver-general; and their liability in such cases.

By statute it is provided, that all assessors, chosen or appointed, shall duly observe all such warrants as, during the time of their office, they shall receive from the treasurer or receiver-general, pursuant to an act or acts made and passed by the general court of this commonwealth, for the assessing and apportioning any rate or tax upon the inhabitants or estates within the town or district, whereof they are assessors; on pain that the assessors of any town or district, failing of their duty required by such warrant of the treasurer, shall forfeit and pay the full sum in such warrant mentioned, to be by them assessed, to the use of the commonwealth; which shall be levied by distress and sale of the estates, real and personal, of such deficient assessors, by warrant from the treasurer, directed to the sheriff of the county, or his deputy, in which such town or district lies.

Mass. Stat. Feb. 10, 1786, act 1, sect. 4.

Duty of assessors to obey the warrants of the treasurer.

Penalty for neglect.

Mode of levying such penalty.

And the treasurer is authorized and required in such case, *ex officio*, to issue his warrant, requiring the sheriff, or his deputy, to levy the said sums accordingly; and for want of estate, to take the bodies of such deficient assessors, and imprison them until they pay the same; which warrant, the sheriff, or his deputy, is empowered and required to execute accordingly.

Duty of the treasurer in case the assessors neglect to obey his warrant.

And the court of sessions, in the county where such deficient assessors dwell, are directed and empowered forthwith to appoint other meet persons to be assessors of such rates or taxes, according to the directions contained in the treasurer's warrant, issued to the former assessors; and the assessors, who shall be so appointed, shall take the oath and perform the same duties, and be liable to the same penalties, as the former assessors.

In such case, also, the sessions are directed to appoint new assessors.

Duty and liability of the new assessors.

Thus much as to assessors of towns and districts.

Mass. Stat. Feb. 20, 1786, act 1, sect. 13.

Duty and liability of assessors of plantations.

As to assessors of plantations, it is provided, that if su assessors, accepting such trust, shall be remiss, or negl their duty; in every such case, such deficient assess shall be liable to the same penalties, to be recovered by t same process, as by the act is provided in case of defici assessors chosen by towns.

XX. Proceedings in case the estates of assessors sh be insufficient to satisfy a tax, to the payment of which, official delinquency, they have rendered themselves liabl

Mass. Stat. Feb. 15, 1800, act 2, sect. 3.

Where assessors, in cases of delinquency, have rendered themselves liable to pay a tax, and their estates are insufficient to satisfy such tax; in such case, the treasurer may issue his warrant, requiring the officer to levy the sum, unsatisfied by the assessors, on the estate of any inhabitant of the deficient town, &c.

Relative to this subject, there is a provision, by statu which enacts, that if the assessors of any town, district, plantation, from which any state or county tax shall be quired, shall neglect to assess the tax required by the w rant issued to them, or to reassess any tax on the failure any collector, and to certify the assessment, as the law rects; and the estates of such assessors shall be found sufficient to pay the same tax, in the manner already p vided by law; then, and in every such case, the treasu of the commonwealth, or of the county, for the time beir is authorized, and directed, to issue his warrant, under l hand and seal, directed to the sheriff of the county, or l deputy, requiring him to levy and collect, by distress a sale, so much of the sum mentioned therein, as the estat of the assessors shall be insufficient to pay, of the estat real or personal, of any inhabitant of the deficient tow district, or plantation; which warrant, the said sheriff his deputy shall execute; observing all the rules and reg lations, and all the provisions, mentioned in the first secti of the same act.*

Sect. 4.

Where the estate of any inhabitant is thus taken, he may have an action against the town, to recover its value, with interest of 12 per ct.

The same statute has further provided, that if the esta of any inhabitant or inhabitants, (not being an assessor assessors of any town, district, or plantation) shall be levi upon and taken as aforesaid; he or they shall have an a tion or actions against the town, district, or plantation, recover the full value of the estate so levied upon and take with interest thereon; computed at the rate of twelve p cent. per annum, from the time the said estate was take with legal costs of suit: And at the trial, the plaintiff

Proof of the value.

* See p. 123, 124, where the section, referred to, is quoted.

plaintiffs shall be admitted to prove the real and true value of the estate so taken, at the time the same was levied upon.

Such actions may be supported against plantations.

And, in order that such action or actions may be supported against a plantation,

Sect. 5.

It is further provided by the same statute, that each plantation in the commonwealth, from which any state or county tax shall be required as aforesaid, is a body politic and corporate, for the purposes aforesaid; and liable to such action or actions, with full power to defend the same, in the same manner as towns, by law, may defend suits against them.

Plantations declared bodies politic for this purpose.

TITLE XVI

ASSUMPSIT.

1 Selw. 38.

THE action of assumpsit is an action of trespass on the case, whereby a compensation in damages may be recovered, for any injury sustained by the non-performance of a parol agreement.

Ibid. 39.

Mitchinson v. Hewson, 7 T.R. 351, in nota.

Agreements are distinguished into agreements by specialty, and agreements by parol. The law of England does not recognize any other distinction. If agreements are merely written, and not specialties, they are parol agreements, and a consideration must be proved.

Bennus v. Guyldley, Cro. Jac. 505.

1 Selw. 39.

The action of assumpsit is confined to agreements by parol; the action of debt, or covenant, being the proper remedy for the non-performance of agreements by specialty.

1 Esp. Dig. 1.

These contracts are either *express* or *implied*. Both are equal grounds of this action; for the obligations of natural justice are equally strong as the most express promise, in the eye of the law.

Slade's Case, 4 Co. 92. Per Ld. Mansf. 4 Burr. 1008.

Assumpsit is of two sorts: 1. *Indebitatus assumpsit*, which will lie in many cases where debt lies, and in many cases where debt will not lie. 2. A *special* assumpsit, in which the damages are not in the nature of a debt, but as a compensation for injury; for, in *indebitatus assumpsit*, the

1 Esp. Dig. 1.

plaintiff recovers not only damages for the special loss, if any, but to the amount of the whole debt; and therefore a recovery in this action would be a good bar to an action of debt brought upon the same contract.

1st. Of assumpsit for money had and received; lent and advanced; and laid out and expended.

2d. Of assumpsit on a quantum meruit; a quantum valebat; and insimul computassent.

3d. Of other implied assumpsits.

4th. Of assumpsit for use and occupation.

5th. Of assumpsit arising from sales.

6th. Of assumpsit arising from wagers.

7th. Of assumpsit in reference to factors.

8th. Of assumpsit in reference to agents and receivers.

9th. Of assumpsit in reference to masters and owners of vessels.

10th. Of assumpsit in reference to seamen's wages.

11th. Of assumpsit in reference to contracts made by agents and servants.

12th. Of assumpsit in reference to partners.

13th. Of assumpsit in reference to executors and administrators.

14th. Of assumpsit in reference to the consideration.

15th. In what cases assumpsit cannot be supported by reason of a voluntary courtesy.

16th. Of the pleadings on the part of the plaintiff.

17th. Of the evidence on the part of the plaintiff.

18th. Of the pleadings on the part of the defendant; in which is included the evidence on the part of the defendant.

19th. Of the verdict and damages.

20th. Of the costs.*

I. Of assumpsit for money had and received; lent and advanced; and laid out and expended.

* Note. Assumpsit of the husband, arising from the contracts of the wife, are treated of under the title of Husband and Wife. Assumpsit arising from the contracts of infants, are treated of under the title of Infancy. Assumpsit for the debt of a *third* person, and such other assumpsits as are affected by the statute of frauds, are treated of under the title of Contracts. Assumpsit arising from bills of exchange, promissory notes, and policies of insurance, are treated of, respectively, under titles of the same names. To avoid tautology, therefore, these subjects are omitted under the present title. The compiler has been induced to this arrangement, that he might bring his work as near as possible to the dictionary form; such form being, of all others, the best calculated for facility of reference.

3 Bl. Com. 163.

One species of implied assumpsits is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of the owner only; and implies that the person, so receiving, promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action lies against him, for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained, in violation of such his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which, *ex æquo et bono*, or in equity and good conscience, he ought to refund.

2 Burr. 1012.

It therefore lies to recover back money paid under a *mistake*, or through the deceit of the other party.

Ibid. 1010.

1 Esp. Dig. 2.

As if an underwriter pay money on an insurance of a ship supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid.

Bize v. Dickason, 1 T. R. 285.

1 Selw. 69.

So where A, who was indebted to the estate of B, a bankrupt, paid the debt to his assignees, without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt; it was holden, that A might recover the money, which he had neglected to set off, in an action for money had and received against the assignees.

Union Bank v. Branch Bank, 3 Mass. T. R. 74.

So if A, confiding, though improperly, in the mistaken affirmation of B, pay him money; yet may this money be recovered back, in this action.

Hasser v. Wallis, 1 Salk. 28.

1 Esp. Dig. 3.

So where the plaintiff, being a feme sole, married the defendant, Wallis, who was, in truth, married to another woman; he made leases of her land, and received the rents; plaintiff, afterwards, discovering the deceit, brought *indebitatus assumpsit* against him, for the rents so received, and recovered.

2 Burr. 1012.

This action will also lie to recover money paid for a consideration which happens to fail.

1 Esp. Dig. 3.

Shove v. Webb, 1 Term. Rep. 732.

As where plaintiff had paid to defendant a sum of money for an annuity, the memorial of which, not being duly registered in pursuance of stat. 17, Geo. III, c. 26, it was set aside, and made void by the statute; plaintiff, the grantee,

was allowed to recover back the money so paid, by this action.

But where the defendant had joined the person, who sold the annuity to the plaintiff, merely as a security, but in reality never received any part of the money, though he signed with the other the receipt for the purchase money, and the annuity was void under the statute, not being registered, it was adjudged that defendant was not liable; for plaintiff had no equity on his side, the defendant having received no part of the purchase money. Stratton v. Rastall, 2 T. Rep. 366.

So where plaintiff paid money to defendant, on defendant's promise to make him a lease of land, and before the lease made, defendant was evicted; plaintiff recovered his money by this action, the consideration not having been performed. Brig's Case, Palm. 364. 1 Esp. Dig. 3.

So also will this action lie to recover money paid to one acting under, or in pursuance of, a void authority. Jacob v. Allen, 1 Salk. 27.

So if I pay money to a person who claims an authority to receive it, but really has no such authority; and afterwards I am obliged to pay it again to the person lawfully entitled to the receipt of it; money had and received will lie against the person unjustly receiving the money. Bonnel v. Foulke, 2 Sid, 4. 1 Selw. 68.

Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office; money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees. Arris v. Stukely, 2 Mod. 260.

When an agent compromises a demand of his principal, by receiving from the debtor a negotiable note, endorsed specially to the agent, the principal cannot maintain *trover* for the note; but the agent becomes immediately answerable for the amount of the liquidated damages, as for so much money received by him to the use of his principal. Floyd v. Day, 3 Mass. T. R. 403.

So also will this action lie to recover money obtained from any one by *extortion*, *imposition*, *oppression*, or taking an *undue advantage* of the party's situation. 2 Burr. 1012.

As where plaintiff, having pawned plate to the defendant for 20*l.*, at the end of three years came to redeem it, and tendered 4*l.* being more than the legal interest for that time; the defendant refused to take less than 10*l.*; plaintiff Astley v. Reynolds, 2 Str. 915.

paid the 10*l.* and had his goods; and now brought his action for the surplus above legal interest, so extorted from him; and on a case made, the court held the action maintainable for the money, so obtained from him, against his consent. It was in this case objected, 1st, that the plaintiff should not have paid the money, but have brought trover; but this was overruled, as the plaintiff might want his plate immediately; 2dly, that *volenti non fit injuria*, he having voluntarily paid his money. But, it was answered, that that only holds where the party has a freedom of exercising his will, which, here, he had not.

Smith v. Bromley, Doug. 696, in nota.

So where plaintiff's brother was a bankrupt, and she was induced by an agent for the defendant, who was a principal creditor, to give him 40*l.* to sign the bankrupt certificate; the money, so paid for that purpose, was allowed to be recovered back, in this action, as oppressively and unjustly extorted from the plaintiff.

Cobden v. Kendrick, 4 T. R. 432, in notis.

So where an action was brought against a person upon a groundless demand, and the cause was compromised by the payment of the money demanded; it was holden, that money had and received would lie for the recovery of the sum so paid.

1 Selw. 69.

Marriott v. Hampton, 7 T.R. 269.

But where money has been paid under the compulsion of legal process, in an action, which the party might have defended successfully, if he had been prepared with his evidence; this money cannot be recovered in an action for money had and received; although such evidence be produced at the trial of the second action, as shews, that the other party was not entitled to recover it in the first.

1 Selw. 69.

Same Case, Per Grose, J. 1 Selw. 70.

For it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence.

1 Esp. Dig. 5.

This action lies to recover money embezzled, or which any person has been defrauded of, by cheating or otherwise.

Whip v. Thomas. Trin. 1 Geo. I. Bull. N. P. 130.

As where defendant was nurse to plaintiff's intestate, and, when he died, went off with the money he had about him, the administrator of the person deceased was allowed to recover back the money so embezzled, by this action, as money had and received to the plaintiff's use; and Lord

Chief Justice Parker said, he would *presume* a subsequent agreement; and the bringing the action is an admission of such consent to make a contract of it.

This action lies also to recover back money lost at gaming. In such case, the action must be brought within three months next after the money paid; and, if the loser omit to bring the action within that time, the statute has given an action of debt against the winner to any third person who will sue, to recover treble the value of the money lost and paid; one moiety to the use of the prosecutor, the other moiety to the use of the poor of the town where the money was lost. Mass. Stat. Mar. 4, 1786, sect. 2.

This action lies also by a public teacher of religion in one town or parish, against another town or parish, in whose treasury monies have been paid for the support of public worship, by persons belonging to the religious society of such teacher.

The constitution has provided, that all monies, paid by the subject towards the support of public worship, and of public religious teachers, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct, in which the said monies are raised. Bill of rights, art. 3.

And this provision of the constitution has been confirmed by an act of the legislature. Mass. Stat. Mar. 4, 1800, act 19.

However, to entitle the plaintiff to this action, the person, paying the money, must request that the money be paid to his own teacher, and must produce a certificate in substance as prescribed by statute; which certificate, having been produced to the selectmen, committee, or assessors, (as the case may require) of the town, district, parish, precinct, or other body politic, or religious society, by whom he or she is thus taxed, it shall be sufficient to require them, respectively, to order and direct the treasurer of such corporation, or religious society, to pay over the amount of such taxes, to the use of the public teacher of For form of certificate, see Append. No. IV. Mass. Stat. Mar. 4, 1800, act 19, sect. 4.

... of West-Springfield, 1 Mass. T. R. 32.

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Lindon v. Hooper, Cowp. 414.

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So where this action was brought to recover back *money, given as the difference in the exchange* of two horses, where it afterwards appeared that one of them was unsound; the action was held not to lie; for the *warranty* was the point to be tried, which it could not be in this action. 1 Esp. Dig. 97.

So it will not lie, as for *money had and received*, to recover *stock in any of the public funds;* for stock is not money. 5 Burr. 2589. 2 Bl. Rep. 684.

So it will not lie for a surety, who has paid the debt of his principal; in such case, the declaration must be for money *laid out and expended.* Ford v. Keith, 1 Mass. T. R. 139.

So, where money has been *voluntarily* and *understandingly* paid, upon a contract made *bona fide*, without fraud, imposition, or deceit, although it was paid without a consideration; the law will not compel a repayment, but leaves the parties as it finds them. 1 Mass. T. R. 65.

As in this case, the defendant, having certain pretensions to lands in the province of *Canada*, had, by a *deed of quit-claim*, conveyed his right therein to the plaintiffs, for one hundred pounds, which they had paid to the defendant; and the plaintiffs, not being able to hold any thing by virtue of the defendant's deed, had brought the present action to recover back the money paid, as the consideration of the deed. But as no *fraud* or *imposition* was pretended to have been practised by the defendant, the court were clear, that the plaintiffs could not support the action: And they quoted the rule, that, where the parties are equally *innocent* or equally *guilty*, *melior est conditio defendentis.* Gates & al. v. Winslow, 1 Mass. T. R. 65.

Where money is paid by one, of two parties to an illegal contract, *to the other*, in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed, to recover the money back again; for, *in pari delicto, potior est conditio defendentis.* 1 Selw. 81.

So where a lottery-office keeper paid money on an insurance policy, which insurance was against act of parliament; having brought his action to recover it back, it was resolved, that the insurance, being illegal, the court would not assist him in the recovery of that he had *voluntarily* paid, and defendant had judgment. Browning v. Morris, Cowp. 790.

So it was adjudged, that a premium, paid by the plaintiff on a reassurance of a ship, (void by stat. 19 Geo. II. c. 37) Andree v. Fletcher, 3 T. R. 266. 1 Selw. 84.

could not be recovered in an action for money had and received, after the ship had been captured.

Vandyck v. Hewitt, 1 East' Rep. 96.

1 Selw. 84.

In like manner it has been holden, that the premium, paid on an illegal insurance, to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again; although the underwriters could not have been compelled to make good the loss.

3 Bl. Com. 163.

Carth. 446.

2 Keb. 99.

Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this assumpsit.

Per Kenyon, Ch. J. 8 T. R. 310.

1 Selw. 65.

As where one person is surety for another, and compellable to pay the whole debt, and the surety is called upon to pay; it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay the debt by request of the principal.

Merryweather v. Nixan, 8 T. R. 186.

But if A recover in *tort* against B and C, and levy the whole damages on B, B cannot maintain an action against C, upon an implied assumpsit, for a reimbursement of a moiety; for a contribution cannot be claimed as between joint wrongdoers. But a different rule holds in the case of a joint judgment against several defendants, in an action of assumpsit.

1 Selw. 66.

It is observable, that the mere circumstance of one person being benefited by the payment of money by another, is not sufficient to raise an assumpsit against the former; if it were, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor, *nolens volens*. The consent of the party, therefore, either express or implied, is essentially necessary to support the action.

So where a person makes a loan of money to another, at his request, the law in this case implies an assumpsit of repayment, and the lender may have an action, for money *lent and advanced*, against the borrower.

South-Sea Company v. Duncomb, 2 Stra. 919.

Assumpsit will lie for money lent, *though the lender of the money has taken a pledge for his security;* for he shall be presumed to trust to the personal security of the bor-

rower, as well as to the pledge, unless there appears a special agreement to discharge the person.

In declaring in assumpsit for money lent and advanced, it must always be to *defendant himself.* 1 Esp. Dig. 134.

For where plaintiff declared for money *lent* by him to *one James Dalrymple*, at the special instance and request of defendant, judgment was arrested; for the word *lent*, is a technical term, and imports a *loan* to *J. Dalrymple*; if so, he is the debtor, and therefore defendant cannot be charged. But it had been otherwise, had the plaintiff declared for money *delivered* to such a person, at the request of defendant; for then the loan had been to defendant himself. Marriott v. Lyster, 2 Wils. 141. Butcher v. Andrews, Salk. 23.

But where plaintiff declared for money *lent to defendant's wife*, at his request, and it was attempted to arrest the judgment, on the authority of the cases above; the court held, that a loan to the wife at the husband's request, was a loan to the husband himself, and the plaintiff had judgment; for the husband and wife are but one person. Stephenson v. Hardy, 3 Wils. 388.

II. Of assumpsit on a quantum meruit; on a quantum valebat; and on an insimul computassent.

Another class of implied contracts are, such as result from natural reason, and the just construction of law: Which class extends to all presumptive undertakings or *assumpsits*; which, though perhaps never *actually* made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man has engaged to perform what his duty or justice requires. Thus, 3 Bl. Com. 161, 162.

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action upon this implied assumpsit; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved to have, and then to aver, that his trouble was reasonably worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. Ibid. 162.

3 Bl. Com. 162.

2. There is also an implied *assumpsit* on a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action may be brought accordingly, if the vendee refuses to pay that value.

Ibid. 163.

3. Likewise, upon a stated account between two merchants, or other persons, the law implies, that he against whom the balance appears, has engaged to pay it to the other, though there be not any actual promise. And, from this implication, it is frequent for actions to be brought, declaring, that the plaintiff and defendant had settled their accounts together, *insimul computassent*, (which gives name to this species of assumpsit) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it.

III. Of other implied assumpsits.

1 Esp. Dig. 7.

1. If a person becomes a member of any society or company, he thereby agrees to abide by all legal claims arising against him from the by-laws or local regulations of that society to which he belongs.

2 Lev. 252.

Therefore, *indebitatus assumpsit* was held to lie against defendant for *twenty pounds*, being the penalty forfeited by the by-law of the company, for not serving the office of steward, in pursuance of such by-law.

1 Esp. Dig. 10.

2. Wherever the law has imposed any *duty* upon a person, and given him certain *allowances or charges for it*, he shall recover them in this action. As if a sheriff serves a writ, the law implies that the plaintiff in the action assumed to pay the legal fees arising from such service.

IV. Of assumpsit for use and occupation.

3 Selw. 1180.

Formerly an action of assumpsit for rent arrear, upon a parol lease for years, could not have been maintained, either pending, or after the expiration of the term; because it was considered as a real contract: The only remedies were by distress, or action of debt. But, on a mere promise to pay a sum of money, or so much as the plaintiff deserved to

have, in consideration of the plaintiff's permitting the defendant to occupy lands, &c. an action of assumpsit might have been maintained at common law. In this case the objection as to the contract being *real*, was removed by considering the permission to occupy, as not amounting to a lease, and the mere promise to pay a sum of money, in consideration of such permission, as not amounting to a reservation of rent.

In order, however, more effectually to obviate the difficulties which occurred in the recovery of rent, where the demise was not by deed, it was enacted by stat. 11 G. II. c. 19, s. 14, "that landlords, *where the agreement is not by deed*, may recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of any such action, any parol demise, or any agreement, (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." 3 Selw. 1180.

And where there is a note in writing, expressing the *quantum* of the rent, no evidence of a parol agreement for the payment of any greater rent than is therein expressed, shall be admitted. Preston v. Merceau, 2 Bl. Rep. 1249.

It will be proper to remark, that the statute provides a remedy in such cases only where the agreement is not by deed; but it has been holden in one case, where the defendant held under a mere agreement for a lease, which did not amount to an actual demise, that the plaintiff might maintain an action for use and occupation, although such agreement was by deed. Elliott v. Rogers, 4 Esp. Rep. 59. Kenyon, Ch. J.

The words of the statute are, that the plaintiff may recover a reasonable satisfaction for the lands, &c. held or occupied by the defendant, in an action for use and occupation. An occupation by the tenant of the defendant, is, as far as it respects the plaintiff, an occupation by the defendant himself. Hence if A agree to let lands to B, who admits C to occupy them, A may recover the rent in an action against B, for use and occupation. 3 Selw. 1183. Ball v. Sibbs, 8 T. R. 327.

1 Esp. Dig. 19.

The same statute of Geo. has further provided, that if any tenant for life dies before or on the day on which any rent was made payable, upon any lease which determined with the life of such tenant for life, his executors or administrators may, in this action, recover against the undertenant such a rateable part of such rent, as would be due to the tenant for life, for the time he lived.

2 Selw. 1186.

The defendant in this action will not be allowed to impeach the *title* of the plaintiff, by whose permission he entered upon, and occupied the tenement demised. Hence a plea of *nil habuit in tenementis* cannot be pleaded. Upon the same principle, *nil habuit in tenementis* cannot be given in evidence in this action.

Girardy v. Richardson, 1 Esp. Rep. 13.

In an action for use and occupation, if it appear that the premises were let to the defendant for the purposes of prostitution, the action cannot be sustained; the contract being *contra bonos mores*.

V. Of assumpsit arising from sales.

1 Esp. Dig. 11.

This action, founded on sales, may be either at the suit of the vendor, for the price of the thing sold, on the *express*, or of the vendee to recover back the money he has paid, some defect appearing in the thing sold, or fraud in the vendor, on the *implied* undertaking.

Ibid.

For if a contract is made on a sale, it is always supposed that the vendor has a good title; if therefore there is any concealment of the circumstances affecting the title, and vendee has paid the purchase money, he may wave the bargain, and recover back his money.

Burrough v. Skinner, 5 Burr. 2639.

As where defendant, who was an auctioneer, had sold an interest in land, for which the plaintiff had made a deposit of *fifty pounds*; but upon an objection to the title, and the want of disclosure of some circumstances, the plaintiff declined going on with the contract, for sufficient reason, in the opinion of the court; in consequence of which, plaintiff recovered back the deposit so made.

Flureau v. Thornhill, 2 Bl. Rep. 1078.

But in such case, where the title is not good, the person who had become the purchaser can only recover back his *deposit*, with interest; not any further damages for the supposed loss of a good bargain.

If possession has been given of the thing purchased, this action will not lie, unless the goods, so purchased, have been returned; for then the contract is at an end, and plaintiff may sue for the money. 1 Esp. Dig. 13.

As where plaintiff purchased a horse and chaise, for which he paid nine guineas; and it was agreed, at the time of the sale, that if the horse did not please the wife of the plaintiff, he should be at liberty, within three days, to return him. Within the three days he did return him, and recovered back his money. Ibid.

But where the contract is still *open*, no action will lie. Ibid.

As where plaintiff purchased of defendant a pair of horses for seventy guineas, but which defendant undertook to take back, if returned within a month. The plaintiff did return the first pair, within the month, but took a second pair; these he also returned, and took a third pair, which he also offered to return; but defendant refusing to take them, he brought his action for money had and received, and held not to lie, the contract being still open. Weston v. Downes, Dougl. 23.

When a purchase is made, if the money is paid, and the thing contracted for is not delivered, vendee may recover back the money so advanced, in this action; this disaffirming the bargain; otherwise, when the bargain is made, the property of the goods is transferred to the vendee, and that of the price to the vendor; and for that he may maintain *assumpsit* even before delivery, provided the sale has been a good one. Anon. 1 Stra. 407. 2 Bl. Com. 448. 1 Esp. Dig. 13.

If the vendor takes upon himself the delivery of the goods purchased, to the vendee, he stands all risques; but if the vendee points out the particular mode of conveyance by which the goods are to be sent, and vendor sends them according to such direction, and they miscarry, vendee must stand at the loss. Per Ld. Mansf. in Vale v. Bayle, Cowp. 296.

So also, if there be a legal and binding sale of a horse by A to B, and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still the vendor is entitled to the money, because, by the contract, the property was in the vendee. 2 Bl. Com. 448.

It is enacted by statute, that no action shall be brought upon an agreement that is not to be performed within the Mass. Stat. June 19, 1788, ch. 5, sect. 1.

Statute of Frauds.

space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized.

It is further provided, by the same statute, sec. 2, that no contract for the sale of any goods, wares, or merchandize, for the price of *ten pounds* or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

The statute above quoted is entitled "*An act* to prevent *fraud* and *perjury*;" and is copied from the English statute of frauds, 29 Charles II. The judicial construction which the statute of Charles has received in the English courts, will therefore be noticed under the title of CONTRACTS.

VI. Of assumpsit arising from wagers.

Cowp. 38.

1 Esp. Dig. 16.

By the common law of England assumpsit will lie to recover a wager fairly won;* and arising on a contingency, the event of which is then unknown to both parties; but it must not be for a blind to an illegal or an immoral transaction, or to conceal usury or bribery; nor must it be inconsistent with the sound policy of the *state* to support it.

Ibid.

It is essential to a fair wager, that it be *contingent*, and the event unknown to the parties at the time of laying the wager; for if either side have a *certainty* of winning, the wager is void.

Lord March v. Pigot, 5 Burr. 2802.

As where the wager in question was between two young men, on the longest life of their respective fathers: in fact,

* How far the English doctrine of wagers applies to our own system of jurisprudence; or whether a wager, under any circumstances, is recoverable, by *our* law, is a question which perhaps remains to be decided. The compiler knows not of any case decisive of this question.

at the time when the wager was laid, the defendant's father was dead; he having died the same day on which the wager was made; but at such a distance, that the event could not be known for some days after. Defendant refused to pay, on the ground that it was impossible he could win; his father being *then dead when the wager was made*, and that, as he could not win, he was not bound to pay. But it was held, that the event being unknown, it was a fair wager, and plaintiff had judgment.

So where the wager was, that a decree of the court of chancery would be reversed in the lords, on appeal, and the defendant attempted to evade payment. 1st. By asserting, that the wager was not fair, from the circumstance that the laws are positive and certain, and so the event not contingent. 2d. As being improper and disgraceful, and so against principle, to suppose that a decision would take place contrary to right; and, therefore, that the court would not support it. But it was held to be contingent, the question being clearly doubtful; 2, that it was neither improper nor contrary to principle, and plaintiff recovered. Jones v. Randall, Cowp. 37.

The ground of the wager must not be an *immoral or indecent transaction;* for such cannot be recovered. 1 Esp. Dig. 17.

As where the wager was upon the sex of Monsieur Le Chevalier *D'Eon*, the action was held not to lie: 1st. Because it affords an opening to indecent and improper evidence: 2d. Because the peace and character of a third person is materially injured by an inquiry, in which such person is not concerned; but, by the voluntary acts of two uninterested persons, is brought in question. Da Costa v. Jones, Cowp. 729.

Neither must it be a cover to an *illegal transaction.* 1 Esp. Dig. 18.

As where the wager was between two voters, on the event of an election then depending: It was adjudged that the action would not lie; for so it might be made a means of bribery at elections. But had the persons not been voters, it might have been otherwise. Allen v. Hearn, 1 T. R. 56.

And *a fortiori*, wherever the wager is itself illegal, or arises from an illegal transaction, it is not recoverable. Such are the cases of wagering policies. 1 Esp. Dig. 18. 2 Mass. T. R. 1.

Wagers founded on *gaming* are also void. Mass. Stat. March 4, 1786, sect. 1.

VII. Of assumpsit in reference to factors.

Bull. N. P. 130.

If a factor sell the goods of a person beyond sea, he may maintain an action in his own name for the price ; for the promise shall be presumed to be made to him : And so if he buys goods, the seller may have an action against *him* ; for the credit shall be presumed to be given to him ; and particularly because it is for the benefit of trade.

Ibid.

This seems clearly to be the case where there is no interposition of the owner of the goods sold, as to whom it seems, "that the factor's sale creates a contract between the buyer and the owner of the goods ; and therefore if the factor sells for payment at a future day, if the owner gives notice to the buyer to pay *him*, and not the factor, the buyer is not justified in paying the factor." This was the doctrine laid down by the Chief Justice, in the case of *Schrimshire* v. *Alderton* ; but the jury found against his direction.

Schrimshire v. Alderton, 2 Stra. 1182.

1 Esp. Dig. 108, cit. Escott v Milward, Sittings after Mic. 24 G. III.

So afterwards, in the case of Escott v. Milward, the doctrine of the Chief Justice in the case of Schrimshire v. Alderton, was delivered to the jury by Buller, as the clear law on the subject ; and the jury found accordingly for the plaintiff.

George v. Clagett, 7 T. Rep. 359.

2 Selw. 720.

But where a factor, acting under a *del credere* commission, sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him from the factor.

Per Chambre, J. in Houghton v. Matthews, 3 Bos. & Pul. 490.

2 Selw. 721, in nota.

So where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals ; and therefore the whole credit is considered as subsisting between the contracting parties.

1 Esp. Dig. 109.

And every factor ought to sell for ready money, unless the usage of trade is otherwise ; and if he sells upon trust, without usage to warrant him, he alone is chargeable in case of a loss : But if the usage be to give credit, then, in case he sells to a person in good credit, if such person fails, the factor is discharged. But it is otherwise, though the usage to sell is so, if he sells to a person notoriously discredited at the time of the sale ; for then, in case of a loss, he is liable. He should also sell in market overt, or there is no change of property.

But sometimes a factor acts under a *del credere* commission, in which case, for an additional premium beyond the usual commission, he undertakes for the credit of the persons, to whom he sells the goods consigned to him by his principal. 2 Selw. 717.

As a factor has a lien upon goods consigned to him, for his own demands; and as also, if goods consigned to him as factor, remain in *specie*, they are not subject to his bankruptcy; so where *bills* have been remitted to a factor for a special purpose; if not disposed of, or paid away at the time of his bankruptcy, they shall still be considered as belonging to the principal, and be recovered in this action; but subject however to any lien the factor himself may have on them. 1 Esp. Dig. 109. Zinck v. Walker, 2 Bl. Rep. 1154.

When goods are consigned to joint factors, they are in the nature of co-obligors, and are answerable for one another, for the whole. Godfrey v. Saunders, 3 Wils. 114.

A factor, in a foreign country, from whom property consigned to him is taken for a breach of the revenue laws of the country, must nevertheless account for the property, unless he can shew that, in the management of it, he conformed to the laws of such country; or that he was authorized, by special instructions from his principal, to act as he did; or that the property could not be managed in any other manner than that in which he attempted to manage it; and that this was a fact known to his principal, when he made the consignment. Wellman v. Nutting, 3 Mass. T.R. 434.

VIII. Of assumpsit in reference to agents and receivers.

An action for money had and received will not lie by the payer of the money against a known agent or receiver, for money paid *voluntarily* to such agent *for the use of the principal.* For it would he unjust to suffer such an action to proceed, and to leave him to be defended or deserted, as the principal thought fit; and especially, if the action is brought for the purpose of trying any right of the principal. Sadler v. Evans, 4 Burr. 1985.

For where a man receives money for another, as his agent, under a pretence of right, the court will not suffer the principal's right to be tried, in an action against the collector, if the defendant can shew the least *colour* of right in his principal. Bull. N. P. 133.

Buller v. Harrison, Cowp. 566.

1 Esp. Dig. 110.

So where money has been paid to an agent or receiver, *by mistake*; he shall not be liable, *if he has paid it over to his principal*; for he should not suffer for another's mistake, but the payer should resort to the principal himself; but if he has not paid it over to his principal, but *has it in his hands, or only given credit for it to his principal in his books, or on an account between them*; in these cases, he shall be personally liable.

IX. Of assumpsit in reference to masters and owners of vessels.

Ibid.

The master of a ship may bind his owners to any contract which is for *the benefit of the ship*.

Yates v. Hall, 1 T. Rep. 73.

As where the ship was captured and ransomed, and the master prevailed on one of the seamen to become an hostage, and promised him the wages he then had, for the time he should remain with the enemy, till the ransom was paid; this being for the benefit of the ship, was adjudged to charge the owners, although they abandoned the ship and cargo; and the sailor recovered for the whole time he was in the custody of the enemy.

Watkinson v. Bernardiston, 2 P. Wms. 367.

If *repairs* are done to the ship, *at home*, there is no lien on the ship itself, but the owners must be personally sued. But if the repairs are done *abroad*, the master, by the maritime law, may hypothecate the ship's bottom.

Garnham v. Burnett, 2 Stra. 816.

The person who repairs a ship, has his election, either to sue the master who employs him, or the owners; but if he undertakes it on a *special* promise from either, the other is discharged.

1 Esp. Dig. 111.

But where no such agreement appears, both are subject; and no private agreement between the master and owners, shall deprive a person, who has a charge against the ship for repairs, from suing either party.

Rich v. Coe, Cowp. 636.

For where the owners of a ship *leased her for years to the master*, under covenants, giving him the *sole* disposal of her, for his own *sole* benefit, he undertaking to keep her in repair, *during the term*; the owners *were*, notwithstanding, held to be liable for repairs done to the ship during the term, and necessaries furnished to her, by order of the master; though they were unknown, at the time, to the plaintiff who

furnished them. But if the plaintiff had had notice of the contract between the master and owners, it might be a ground to absolve the owners.

But the master is liable on *his own* contract, and no further. Per Ld. Mansf. Cowp. 639.

He therefore is not liable to be sued for necessaries furnished the ship *before the time he became master of her;* for there there is no contract. Farmer v. Davis, 1 T. R. 108.

And so much is the interest of the master considered only as that of a servant, and the whole property in the owners; that where a custom-house-officer had exacted exorbitant fees from the *master* of a vessel; an action for money had and received was adjudged to lie against the officer, at the suit of the *owners*. Stevenson v. Mortimer, Cowp. 805. 1 Esp. Dig. 112.

X. Of assumpsit in reference to seamen's wages.

Freight is the mother of wages; therefore, in case a loss happens to the ship, no wages are recoverable; that is, the whole voyage must be performed, or the sailors shall not be entitled to any wages; for the ship is entitled to freight, only on delivery of the cargo. Ibid.

Therefore where the plaintiff was engaged as a sailor, on a voyage from *Barnstable* to *Portugal*, or *Spain*, *taking in a cargo of fish at Newfoundland*, and the ship was taken soon after she had sailed from *Newfoundland;* it was contended, that there were two distinct voyages, one to *Newfoundland*, the other from Newfoundland to *Spain;* and that therefore the sailors were entitled to wages for the voyage to *Newfoundland*. But it was resolved, that the voyage was entire; for on the delivery of the cargo the ship is entitled to freight, and therefore that, in this case, no wages were due; the ship being taken before she had reached the discharging port.* Hernaman v. Bawden, 3 Burr. 1844. 1 Esp. Dig. 113.

And on this ground, where no freight is earning by the ship, the mariners have no title to wages. 1 Esp. Dig. 113.

Therefore, *while a ship is lading or unlading*, the sailors are not entitled to wages; unless there is a special agreement to that effect, to allow wages during that time; in which case it shall be good. Campion v. Nicholas, 1 Stra. 405.

* See the case of Brooks *vs.* Joseph & John Dorr, *post*, 164.

1 Esp. Dig. 113.

And the case is the same of *letters of marque*, or *privateers*; for the voyage or cruize must be performed, or no wages are due to the mariners.

Abernethy v. Landale, Doug. 539. 1 Esp. Dig. 113.

Therefore, where the plaintiff had engaged on board a *letter of marque* on a cruize, at the rate of five pounds per month, and a share of the prize-money; they took a prize, and the plaintiff was put on board her as prize-master, and got safe to *England*; but the ship was afterwards taken, on her cruize: It was adjudged, that though he was entitled to a share of the prize-money, yet that he had no claim to wages, on account of the capture of the ship.

2 Mass. T. R. 39.

But although the ship be captured, yet if no condemnation follows, and there be no subsequent proceedings tending to change the property, or destroy the freight, such capture will not operate a loss of wages.

Ibid.

So also, if, by means of the capture of the ship, a seaman is prevented from performing his voyage, yet shall he not, merely from that circumstance, lose his wages. To subject him to such loss, he must be guilty of an actual or virtual desertion of the ship.

Brooks v. J. & J. Dorr, 2 Mass. T. R. 39.

As in the case of Brooks vs. Jos. & Jno. Dorr. The parties agreed to the following state of facts; that the plaintiff, about the 12th Nov. 1799, shipped, as mate, on board a ship owned by defendants, for a voyage from *Boston* to *Charleston*, S. C., thence to *London*, and thence to her port of discharge in the United States. The ship arrived at *Charleston*, there took in a cargo, on freight, for *London*; and on the 12th March, 1800, on her passage for *London*, was taken by a French privateer. The plaintiff, with other seamen, was taken, out of the ship, on board the privateer, and carried into *France*, as prisoner; where the plaintiff was detained until the 12th May following, when he was released; and he then, as soon as he could, returned to *Boston*, where he arrived on the 12th July, 1800. The ship was carried by the captors into *St. Andero*, in *Spain*, and there detained until the 10th Dec. 1800. She was then restored, and delivered to the master, who proceeded to *London*, the original port of destination. He arrived there on the 13th June, 1801, delivered his cargo, and received his full freight money. The ship and freight were

insured, and, upon receiving intelligence of the capture, the owners abandoned to the underwriters on 12th June, 1800, and on 1st Nov. following, received, as for a total loss. These were the material facts agreed; and the plaintiff thereupon demanded of the owners the balance of his wages, to be computed from the time of his shipment to the time of his arrival at *Boston*.

Upon these facts the court decided, that the plaintiff should recover his wages from the time of his shipment, until his arrival at *Boston*: For although the plaintiff did not pursue the ship, and complete the voyage to *London*, yet his conduct did not amount to a desertion of the vessel. On the contrary, from the facts agreed, the presumption was violent, that he did not know where the ship was to be found, that he had no means of resorting to her, and that his departure for *Boston* was a matter of necessity and not of choice.

So also if there be an abandonment, yet shall the seaman recover his wages of the owner, and not of the insurers.

For in the case last quoted, Brooks vs. Jos. & Jno. Dorr, the defendants contended, that their abandonment to the underwriters put an end to the contract between the seamen and owners; and that if the plaintiff had a right to wages, he must claim them of the underwriters; who became, to all intents, owners of the ship after the abandonment, and in whose employment, if any one's, the plaintiff was. But the court decided, that the owners, that is, the defendants, were liable, and not the underwriters; for underwriters are strangers to contracts for seamen's wages; they are unknown to seamen, and are frequently scattered through different countries.

Brooks v. J. & J. Dorr, 2 Mass. T. R. 39.

But if the owners of a vessel, which is wrecked, have abandoned to the underwriters, and are afterwards compelled to pay the wages of the seamen; the underwriters are bound to reimburse the owners, if sufficient for that purpose was saved from the wreck.

Frothingham & al. v. Prince, 3 Mass. T. R. 563.

So if a seaman can prove, that he was disabled from performing his duty by an accident happening in the course of his duty, e. g. by receiving a blow from a piece of timber,

Chandler v. Grieves, 2 H. Bl. 606, in note. 3 Selw. 959.

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XI. Of assumpsit in
agents and servants.

Ward v. Evans, 2 Salk. 442.

A man shall be bound b
vant, so far as he gives h
him ; but his act shall not
within his authority.

Unwin v. Wolseley, 1 T. R. 674.

Where credit is given
master or *employer*, he is no
ground no action lies again
made by him, *in that capac*

Macbeath v. Haldimand, 1 T. R. 172.

As where defendant was
capacity contracted for stor
were furnished by plaintiff
being given to *government*

a servant to government; that he was not *personally* liable to an action for their amount.

So also where the plaintiff brought *indebitatus assumpsit* against the defendant for his fees as a witness in the contested election of J. B. Varnum, of Middlesex: It appeared that Mr. Varnum was elected a representative in congress, and that a petition was presented to that body, praying that they would investigate the election. In consequence of this petition the defendant was constituted agent for the purposes of this investigation, and was authorized to take depositions touching the election. In pursuance of this authority, the defendant summoned the plaintiff to appear before a magistrate for the purpose of taking his deposition. The plaintiff appeared; and for this service brought his action. But the court held, that the action would not lie; because it appeared that the defendant, in this transaction, was acting as agent for the public, in a business of great national concern. Brown v. Austin, 1 Mass. T. R. 208.

Nor will it make any difference, though the services were performed at the *special instance and request* of the person so acting as agent; for although, in common and ordinary cases, the law *implies* a promise and *personal* obligation, as necessarily resulting from services performed on request, yet such *implication* never arises, where it appears that the request was made by a public agent, acting in a public concern. Ibid. Per Sewall, J.

If a master once sends his servant to obtain goods for him on trust, for which the master afterwards pays; if the servant afterwards fraudulently takes up goods from the same person, which he converts to his own use; the master is liable; for, by paying the first debt, he gave the servant a credit, and ought to be charged. Hazard v. Treadwell, 1 Stra. 506.

In an action on a farrier's bill, it appeared, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. Lord Kenyon said, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom; that if the servant buys things which come to the master's use, the master should Precious v. Abel, 1 Esp. Rep. 350. 3 Selw. 962.

horses, but plaintiff had had n
but with the coachman, whom
The plaintiff never applied to
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3 Selw. 962.

So, where an express authori
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Hiscox v. Greenwood, 4 Esp. Rep. 174.

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3 Selw. 962.

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he had not given any assent.

XII. Of assumpsit in referen

Heare v. Dawes & al. Doug. 371. 1 Esp. Dig. 115.

To make a person liable as a p
agreement *to share in all risques*
many employ a common agent, (
ular purpose, who makes a joint

As here, where defendant had been partner with one *Robinson*, but, the partnership being dissolved, defendant agreed to let a sum of four thousand pounds remain in the trade, *at legal interest*, for seven years, and received also an annuity of three hundred pounds per annum, for the same time; all of which was secured by *Robinson's* bond. It was held, that this should not make defendant a partner, and subject to *Robinson's* contracts; for he had no concern with the business, and the annuity and interest were *certain*, and *independent* of the profits. Grace v. Smith, 2 Bl. Rep. 998. 1 Esp. Dig. 115.

But where defendant, in this action, had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for twenty-four hundred and eighty-five pounds, with interest; (which sum had been brought by defendant into trade) and an annuity of two hundred pounds, for seven years, if *Brooke* so long lived; as in lieu of the profits of the trade; and defendant had, at all times, liberty to inspect *Brooke's* books;—defendant was adjudged to be a partner, and liable; for the charge has reference to the *profits*; it was *casual*, as depending on *Brooke's* life; and his right to inspect the books was that of a *partner*. Bloxham v. Pell, Sitt. Hil. Term, 1775. quot. in Bl. Rep. 999. 1 Esp. Dig. 116.

XIII. Of assumpsit in reference to executors and administrators.

Assumpsit lies against an executor or administrator, on a promise *by* the testator. 1 Esp. Rep. 120.

So he may also maintain this action on a promise made *to* the testator. Ibid.

At common law, no action was maintainable against the executor or administrator of a deceased joint promissor, whom the other promissors survived; but in such case the promise or contract survived against the other promissors alone, and thereby the estate of the joint promissor, deceased, was wholly discharged. Foster v. Hooper, 2 Mass. T. R. 572.

But now, by statute, it is enacted, that the goods and estate of each deceased debtor, in every joint contract thereafter to be made, whether obligation, covenant, or other instrument under seal, promissory note, memorandum in writing, or any other contract, express or implied, or in any Mass. Stat. Feb. 26, 1800, act 3.

2 Bl. Com. 444. Whatever constit
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Ibid. 445. A considèration o
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Ibid. 445, 446. As if one man pron
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1 Rep. Dig. 93. The consideration n
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1 Roll. Abr. 23. As if A promises tc
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Lutwich v. Hussey, Cro. Eliz. 19. And for the same rea
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: the service has been done *at the request* of the person
ig the promise, it shall be good to support this action.
: a promise to a *servant*, in consideration of *past* ser- 1 Esp. Dig. 94.
has been held to be good.
also the consideration must not be *illegal*. For this Ibid. 89.
will not lie where the consideration, on which it is
ed, is an *illegal* act.
where plaintiff gave to defendant 20s. in consideration
ich, he undertook to beat J. S. out of such a close, Allen v. Rescous, 2 Lev. 174.
ay 40s. He did not do it, whereupon plaintiff brought
uit for the 40s., and the action was adjudged not to
e consideration being an unlawful act.
l though the consideration be but in *part* unlawful, 1 Esp. Dig. 89.
shall vitiate the promise, which is founded in the
eration taken together.
ugh the plaintiff in this action has not been a *party* Ibid. 90.
illegal transaction, yet where the assumpsit has *arisen*
t, he cannot recover.
where defendant promised the plaintiff a sum of mo- Stackpole v. Earl, 2 Wils. 133.
procure the purchaser of an office; plaintiff pro-
the purchaser, and then brought his action for the
promised; but it was adjudged not to lie, because
e of an office was an illegal transaction, and conse-
y the assumpsit, founded on it, was void.
where the vendor was concerned in giving assistance Waymell v. Read & al. 5 T. Rep 599, cited by Kenyon, Ch. J. in Vandyck v. Hewitt, 1 East's R. 97, 98.
vendee to smuggle the goods, by packing them in
inner most suitable for, and with the intent to aid that
ie; although the vendor was a foreigner, resident a-
and the sale and delivery of the goods were com-
abroad; it was holden, that the vendor could not resort
laws of England, to give effect to his agreement.
where the transaction is not in *itself* unlawful, no 1 Esp. Dig. 90.
ent illegal use of the subject of it shall destroy the
psit.
where plaintiffs sold tea to defendant abroad, which Holman v. Johnson, Cowp. 341.
elivered at *Dunkirk*; though this tea was for the
e of being smuggled into *England*, and that known
plaintiffs at the time; yet they not being concerned
smuggling, and it being a fair sale as to them, they
llowed to recover the price of the tea, in *England*.

er ; this person recovered d
false imprisonment, and pl
the defendant.

1 Esp. Dig. 91. Upon similar grounds, as
money promised for doing
duty to do, without reward ;

Stotesbury v. Smith, 2 Burr. 924. As where plaintiff, who
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1 Esp. Dig. 92. Wherever the consideratio
a *fraudulent transaction*, this

Willis v. Baldwin, Doug. 450. For where plaintiffs were
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If the agreement be of suc
1 Selw. 19 it into effect, and enforce it

Therefore, in an action for use and occupation of a lodging, where it appeared, that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge, on the part of the plaintiff, of that fact; it was holden, that the action was not maintainable.

Girardy v. Richardson, 1 Esp. Rep. 13.

So where an action was brought against the defendant for board and lodging, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who had kept a house of bad fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord Kenyon, Ch. J., was of opinion, that such a demand could not be heard in a court of justice.

Howard v. Hodges, Sittings before Ld. Kenyon, 2 Dec. 1796. 1 Selw. 60.

On the same principle it was holden, that an assumpsit would not lie to recover the value of prints of an immoral or libellous tendency; which had been sold and delivered by the plaintiff to the defendant.

Fores v. Johnes, 4 Esp. Rep. 97.

But in an action to recover the amount of a bill delivered for washing done by the wife of the plaintiff, where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentlemen's night-caps, which were worn by the persons who slept with the defendant; with all which circumstances the plaintiff was acquainted; it was holden, that the use, to which the defendant applied the linen, could not affect the contract, and that the plaintiff was entitled to recover.

Lloyd v. Johnson, 1 Bos. & Pul. 340.

So this action, being an equitable one, cannot be supported where the assumpsit arises from an *unconscientious* demand.

1 Esp. Dig. 93.

As where plaintiff lent to defendant a sum of money for the purpose of making a purchase of goods, upon defendant's note, payable on demand; and the plaintiff was to have half the profits on the resale of the things purchased; the purchase was made; and within two hours after, plaintiff made a demand of payment of the note, and brought his action for the interest, and half the profits of the goods

Jestons v. Brooke, Cowp. 793.

beside: It was adjudged, that, as the note bore interest from the demand, to have interest from that time, and half the profits too, seemed to be usurious, the demand being made immediately; but, if not usurious, that it was *unconscientious*; for the agreement was for half the profits, *in lieu of interest*; and defendant had judgment.

So this action cannot be supported, where the consideration has been only *partially* performed; provided the want of a *complete* performance arises from the plaintiff's fault.

Fawcett v. Mansfield & al. 2 Mass. T. R. 147.

As if a tradesman, having contracted to perform a certain undertaking, *voluntarily* leaves it unfinished, he can have no action against his employer for the part performed.

XV. In what cases assumpsit cannot be supported by reason of a voluntary courtesy.

Hob 106.

A mere *voluntary courtesy* will not support an *assumpsit*.

1 Esp. Dig. 87.

And that shall be deemed a voluntary courtesy, which has been undertaken without a prospect of *certain recompense*.

Osborne v. Governors of Guy's Hospital, 2 Stra. 728.

As where plaintiff had done much business for Mr. Guy, (who bequeathed all his possessions to the hospital) and had done it in contemplation of a *legacy* from him; but being disappointed, after *Guy*'s death, he brought this action on a *quantum meruit*, for his former trouble; when it was adjudged, that it would not lie; the business having been done, not with a view to immediate or certain recompense, but with a view to a legacy.

1 Esp. Dig. 87.

But if there was any *request* made by defendant, there the *courtesy* or *benefit* shall be presumed, and construed to be, not voluntary, but done in pursuance of the request; and this action will lie.

Lampleigh v. Braithwait, Hob. 105.

As where plaintiff declared, that defendant, having killed a man, requested plaintiff to labour to procure for him a pardon, for which he promised him an hundred pounds; which, plaintiff having performed, it was adjudged that the action well lie, as arising from the *request* of the defendant.

Grisley v. Lother, Hob. 10.

So, where defendant's testator made a promise to plaintiff, that if she would give her consent to his marriage with her daughter, he would give her an hundred pounds: She

did so, and the marriage took effect: It was adjudged a sufficient consideration to uphold this action.

But though a *request* has been made, yet if it was in consequence of the *offer*, *advice*, or *inducement*, of the *other* party, it will not support this action. 1 Esp. Dig. 88.

As where in *assumpsit* for money had and received, the defendant gave in evidence, that he had paid twenty guineas to the secretary of a foreign minister, for a protection for the plaintiff, and also charged his costs and expenses in procuring it; the judge directed the jury, that in case they believed that plaintiff himself had applied to the defendant to get this protection, to allow the sum paid for it; but that in case they believed, that the advice to get such protection came from the defendant, then to allow him nothing; and the jury found for the plaintiff without any allowance. Aldsworth's Case, Reading Ass. 1749. Bull. N. P. 153.

XVI. Of the pleadings on the part of the plaintiff.

In a declaration in assumpsit, the word *promised* is not necessary; any other intelligible word of the same import, as *agreed*, for instance, is sufficient. Avery v. Inhabitants of Tyringham, 3 Mass. T.R. 160.

Where the debt is to arise from several acts to be performed, at different times, each performance is a distinct duty, and the action may then be brought. 1 Esp. Dig. 128.

As where the contract was to pay twenty pounds: ten pounds at Mich. 1631, and ten pounds at Mich. 1632; it was adjudged, that plaintiff might maintain his action immediately on the first payment becoming due. Miles v. Miles, Cro. Car. 175.

Where the assumpsit is founded on an agreement, in which something is *previously* to be performed by the plaintiff; on condition of which defendant undertakes to pay; it is necessary for the plaintiff in his declaration, to aver, either a *general* performance of his part, or that he is *ready* to do it; and also a *notice* by *request*, to defendant. 1 Esp. Dig. 129.

For where plaintiff declared, that, on the compromise of a suit, defendant undertook to pay him a certain sum of money, in consideration of his executing to defendant a general release. In assumpsit for the money, and judgment by *default*, judgment was arrested, for the reason, that the plaintiff had not averred, that he had *executed* the release, or was *ready* to do it; which was necessary to sup- Collins v. Gibbs, 2 Burr. 899.

Richards v. Carmaval, Hob. 68.

As where the assumpsit was on his coming into *Somersetshi* after verdict, because plaintiff l laration, notice of his coming, to pay,

Wallis v. Scott, 1 Stra. 88.

And in such case, a *special* re the general averment in all dec *requested*," will be insufficient ; ered as sufficient notice.

Bach v. Owen, 5 T. R. 409.

And such defective averment on a general demurrer.

Selman v. King, Cro. Jac. 183.

So that the rule to this effect i the defendant is chargeable on a

Hill v. Wade, Cro. Jac. 543,

on a mere debt, there ought to leged, in point of time, place, &c sit is for a preceding debt, then " *though often requested*," is suffi action is a request.

Frampton v. Coulson, 1 Wils. 33.

Therefore, in declaring on a r necessary, for it acknowledges a action is a request.

Henning's Case, Cro. Jac. 432.

But where notice is not to co from a collateral matter, which own knowledge, (as to pay as mu notice or request is required fron mise was to pay so much as *ever* notice how much others pay, mu

dertook to pay, &c., and in fact says, that he *did* deliver; but does not allege a *place where*; the defendant demurred for want of a *venue*, and the declaration was held ill; for a consideration executory is *traversable*; and therefore the place is necessary to be shewn.

S.C. by name of Jackson v. Miles, Show. 50.

Where the action is brought on *mutual promises*, they must be both made at the same time, or else it will be a contract without consideration, and so no action will lie. And when they are to be *performed* at the *same time*, plaintiff, in such case, need not aver performance.

1 Esp. Dig. 132.

As where the assumpsit laid was, that plaintiff had agreed to deliver to defendant a quantity of cloth; and defendant agreed, on a certain contingency, to pay for the same, five pounds. The contingency *did* happen; and, on action brought, plaintiff had a *verdict*. It was moved, in arrest of judgment, that plaintiff had not averred the delivery of the cloth; but it was resolved, that this being promise for promise, no such averment was necessary; but if it had been that defendant undertook to pay, *if* plaintiff would deliver so much cloth, there the condition would be *precedent*, and an averment of performance necessary.

Martindale v. Fisher, 1 Wils. 89.

So again, where the plaintiff's action is to arise from some precedent act to be done by himself; he should aver and shew his *right* to do such act, and also his *performance* as far as he could; for otherwise he might recover for a consideration which he could not perform.

1 Esp. Dig. 134.

As in assumpsit on an agreement to forfeit a deposit, and also another sum, if defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures therein, at a valuation; it was adjudged, on special demurrer, that plaintiff's declaration was ill; because he had not shewn his *right* to the premises, and that the valuation was actually made.

Luxton v. Robinson, Doug. 620.

And, for the same reason, if the plaintiff avers *performance*, he must also shew *how* performed, that the court may judge if the performance is sufficient to entitle him to the action.

1 Esp. Dig. 133.

As where defendant promised to deliver a horse to the plaintiff, on plaintiff's becoming bound to him by writing obligatory for *eleven pounds*; plaintiff, in his declaration,

Austin v. Gervas, Hob. 69, 77.

both considerations taken
be good, and the other b
verdict, shall be arrested.

Woodford v. Deacon. Cro, Jac. 206.

In declaring in assumps
out *for what the debt beca*
Cooke v. Samburne, 2 Sid. 182.

defendant, being indebted,
debt might be due by *spe*
would not lie.

Hibbert v. Courthope, Carth. 276.

But if it sufficiently ap
the debt is not due by *spe*
labour," generally, without

Cryps v. Bayston, 3 Salst. 31.

So if it be for *necessarie*
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2 Esp. Dig. 235.

The breach assigned in
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Wright v. Johnson, 2 Vent. 64.

As where plaintiff declare
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rowed him ; and the breach
delivered him *at all.* Defen
breach was inconsistent with

Harman v. Owden, Salk. 140.

But in assumpsit to delive
the 5th of January, that def
5th of January, is a good assi

misrecites it, it is fatal ; for so the plaintiff would not prove his whole declaration ; the statute being the first thing to be proved. 1 Esp. Dig. 136.

In assumpsit, the day of the promise, laid in the declaration, is not *material*. Ibid.

As where plaintiff, who was a tailor, brought this action, and six several promises were laid, all upon the 16*th of October*. Defendant pleaded *infancy* to all, generally. Plaintiff replied, as to *two* of the promises, that the defendant was, at the time of making these, of *full age ;* and, as to the rest, that they were for necessaries. Defendant demurred, for that the promises, being all laid on the *same day*, that it was *repugnant ;* that he could not be, at the *same time*, of full, and *not* of full, age. But it was held, that the *time* was a circumstance, in no wise *material*, nor part of the *issue ;* that plaintiff is not tied to a *precise day* in his declaration ; and if defendant *force* him to vary, it is no departure. Howard v. Jennings, 6 Salk. 223. Matthews v. Spicer, 2 Stra. 806.

So also in this action, plaintiff declared on promises to pay the 16th of Jan. 1706 ; defendant pleaded the statute of limitations ; plaintiff replied, that a bill had been filed the 23d Jan. 1714, and that the cause of action arose within six years before ; defendant demurred *generally*, and grounded his demurrer on a *departure ;* but the demurrer was overruled ; for this being a *parol* promise, the time alleged in the declaration is only matter of *form*, not of substance ; so that not being a departure in a *material* part, there should have been a *special* demurrer for want of *form*, not a *general* one. Cole v. Hawkins, 1 Stra. 21.

And so where the cause of action is to arise on a *request*, the *day* of the request is not material ; for it may be laid at *one* time, in the declaration, and a request at *another* time be given in evidence. King v. Bray, 8id. 268.

But where the day makes a *part of the contract*, and so is of *substance*, there, assigning a different day, in the replication, would be a *departure*. 1 Esp. Dig. 136.

So in assumpsit, on an *insimul computassent*, the time and place should be laid when, and where the account was settled, or it will be error ; for which, in this case, judgment was reversed. Desborough v. Kelby, Ld. Raym. 533.

did so, and recovered ; and the had judgment, which was *arre* stranger to the consideration.

1 Esp. Dig. 105.

However, where the consid *to enure to the advantage of a* of exceptions.

1 Vent. 6, in the case Bourne v. Mason.

As where a physician was p *himself*, and another for his c perform a certain cure ; it wa the relation gave the daughter ation performed by her father tain *assumpsit* for the money.

XVII. Of the evidence on

Cooke v. Munstone, 1 Bos. & Pul. N. R. 351.

In the action of assumpsit, the contract, on which the a correctly ; that is, either in t made, or according to the legal terms ; for a material varianc leged, and the contract proved,

1 Esp. Dig. 141.

Where plaintiff declares o ought to prove the contract st *precisely* as laid.

Anon. 1 Ld. Raym. 735.

As where plaintiff declared c ant, to deliver him good merc an agreement to deliver good w held not to support the declarat

of August, and *the opening* were the same, yet it was held a variance, and plaintiff was nonsuited.*

So where the plaintiff had agreed to purchase of the defendant 100 bags of wheat, 40 or 50 of which were to be delivered on one market-day, and the remainder on the next market-day; and the defendant had delivered 40 bags on the first market-day, but had failed in delivering the remainder; in an action brought for the non-delivery of the residue, one count of the declaration stated the agreement to be for the delivery of 40 bags, and another for the delivery of 50 bags, in the first instance; but the contract was not stated in the alternative, in any part of the declaration; the court held the variance fatal; for the contract ought to have been stated according to the *original* terms of it, which made it optional in the defendant to deliver 40 *or* 50 bags in the first instance; and not an absolute contract for the delivery of either of those quantities. Penny v. Porter, 2 East's Rep. 2.

So if the promise alleged be *proved*, yet if it appear to be made on a *different consideration*, from that stated in plaintiff's declaration, or if it be proved to have been made on *that* consideration, and *another*, it shall not support the declaration. King v. Robinson, Cro. Eliz. 79.

But where divers considerations are alleged, some good and sufficient, others idle and vain; if those which are *good* be proved, it is sufficient, though plaintiff fails in proof of the others. But if *all* the considerations alleged are *good*, all must be *proved*; for the promise shall be deemed to be founded on *all* those considerations which are good and lawful. Bradburne v. Bradburne, Cro. Eliz. 149.

But if plaintiff declares on a *special* agreement, and has also other *general counts* in his declaration, if he fails in proving the special agreement, he may go into evidence on the general counts.† Payne v. Bacomb, Dougl. 651. Bull. N. P. 139, 145.

* Buller, in his NISI PRIUS, observes, that this seems rather to be a case founded on the times, to get rid of *South-sea* contracts, than to be relied on, as a precedent, in other cases. Page 145.

† This point is now settled, notwithstanding some contrary decisions; as Weaver vs. Boroughs, 1 Stra. 648. For in an action, where the plaintiff declared on a special agreement, and also on a general

Bull. N. P. 129. So in assumpsit agains
must be proved ; for oth
pond with the declaration

1 Esp. Dig. 142. But where the person
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and has relied on their *joi*
the partners has acted, th
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shall charge them *all*.

Salk. 291. Therefore when *Lay*
were bankers, and *Layfiel*
ble exchange lottery (in w

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and then it was objected that
into proof of the general coun
to go into such proof ; and the
court, that he had asked Mr. J
his lordship, on the circuit) his
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mentioned on the occasion ; wh
ticular case ; but that the circu
vation, had been on this distinc
to prove the special agreement,
ted to go on the general *indebitat*
he did not approve of that disti
the consideration he had given ;

tees) to the plaintiff, and undertook to pay the prize arising from it, the other partners were held to be liable, no disclaimer appearing; for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint credit of *Layfield's* partners.

It was formerly the opinion, that on a count of *insimul computassent*, plaintiff was obliged to prove the exact sum laid; but that idea is now exploded, and plaintiff may now recover *part* of the sum demanded, on this count, as well as on any other. Bull. N. P. 129.

But the court will not admit any evidence of an account *current and unliquidated;* for that would involve the court in a tedious examination. The account, therefore, must always be exhibited as an account *stated.* Lincoln v. Parr, 2 Keb. 781.

Where a book account is the ground of the action, the book may be given in evidence, when supported by the supplementary oath of the plaintiff. This is a mode of proof admitted with us generally, and is so admitted from the necessity of the case. 2 Mass. T. R. 221.

But there are cases, in which a book may be *incompetent* evidence. To be admitted in evidence, it must appear to contain the first entries or charges by the party, made *at* or *near* the time of the transaction to be proved; and when the contrary is discoverable upon the face of the book, or comes out upon the examination of the party, it ought to be rejected as *incompetent* evidence. So also, fraudulent appearances or circumstances, such as material and gross alterations, false additions, &c., are objections to the competency of a book, in which they are discoverable, or against which they may be proved in any manner. Cogswell v. Dolliver, 2 Mass. T. R. 217, Per Sewall, J.

So also, when an account is transferred to a *ledger* from the day book, and it so appears by *post marks;* in such case, the ledger should be produced, that the other party may have advantage of any items entered therein to his credit. Prince v. Swett, 2 Mass. T. R. 569.

There are likewise objections to the *credit* of books, thus admitted in evidence; as when the charges, to be proved, have been entered to a *particular* account, like the entries of a ledger, and not like those of a day-book; or any such objection to the manner in which the book has been kept, is valid against the credit of the book. Cogswell v. Dolliver, 2 Mass. T. R. 221. Per Sewall, J.

Dixon v. Cooper, 3 Wils. 40.

Benjamin v. Porteus, 2 H. Bl. 590.

As to who *is*, and who is *not* a *competent* witness, in this action; it has been decided, that in a trial concerning the delivery of goods according to agreement, the *factor*, who made the agreement, is a good witness, (though he receives a commission on the sale); for he is a mere go-between the buyer and seller, and so may be a good witness for either, as having no more interest on *one* side than on the *other*.

Brown & al. v. Babcock & al. 3 Mass. T. R. 29.

So a consignee of goods on his own account, refusing to receive them, and afterwards selling them, as agent to the consignors, is a competent witness for the consignors, in an action by them against the purchasers, for the price of the goods; although he had indorsed the bill of lading in blank.

Warren v. Merry, 3 Mass. T. R. 27.

But a party to a negotiable security shall not be a witness to prove that, at the time he gave it currency, it was void; but he may be permitted to testify to any facts happening afterwards, if he is not interested.

Cushman v. Loker, 2 Mass. T. R. 106.

And it is now settled, that to render a witness *incompetent* on the ground of *interest*, he must have a *direct* interest in the event of the cause; for where the witness is, in *every* event, liable, and his testimony is to determine to *which* of the parties shall be liable, he is a *competent* witness.

1 Bl. Com. 443.

It is a general rule, that a wife cannot be admitted as a witness either for or against her husband; and so, *vice versa*, a husband for or against the wife; partly because it is impossible their testimony should be indifferent, but principally because of the union of person: And therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, that "*no one ought to be a witness in his own cause*;" and if *against* each other, they would contradict another maxim, that "*no one is bound to accuse himself*." But to this rule there are some exceptions, which will be fully noticed under the title of "HUSBAND AND WIFE."

1 Esp. Dig. 146.

In this action, *strong presumption*, if the best evidence that can be had, shall be admissible and good.

Green v. Brown, 2 Stra. 1199.

As in assumpsit on a policy of assurance, proof that the ship has never been heard of will be good to prove a total loss.

Otherwise the best evidence to be had must always be given. And therefore, in declaring on a contract in writing, the contract must itself be produced in evidence, except the original be lost; in which case, a copy is good evidence. 1 Esp. Dig. 146.

But where an *original* note has been lost, and a *copy* is tendered in evidence, sufficient probability must be shewn to the court to satisfy them, as well of the loss, as that the original note was genuine, before plaintiff will be allowed to read it. Ibid. cit. Godier v. Lake, 1 Atk. 446.

So if a man destroys a thing intended to be evidence against him, a small matter will supply it. As where defendant tore his own note of hand; a sworn copy was admitted as good evidence. Per Holt, Ch. J. 1 Ld. Raym. 731.

XVIII. Of the *pleadings* on the part of the defendant; in which is included the *evidence* on the part of the defendant.

The plea should always answer to the promise or undertaking, as laid in the declaration. 1 Esp. Dig. 147.

Therefore, where in assumpsit by the *assignees of a bankrupt*, defendant pleaded, that the cause of action did not accrue to the *bankrupt* within six years; on demurrer, it was held ill; for the plea does not answer to the promise laid, which is to the *assignee*; and it precludes the plaintiff from proving any promise made to *himself*. Skinner v. Rebow, 2 Stra. 919.

So the plea must be an answer to *every part* of the declaration. 1 Esp. Dig. 147.

For if the plea be pleaded to the *whole* promise, and is an answer but to a *part*; the whole plea is naught, and plaintiff should demur. But when it is pleaded to and answers but to a part, it is a discontinuance. Weeks v. Peach, Salk. 179.

As in assumpsit on *three* several promises, and the plea only goes to *two* of them, it is a discontinuance as to the *third*; and if it be a record of the same term, plaintiff may have judgment, by *nihil dicit*, for so much as is uncovered by the plea. Market v. Johnson, Salk. 180.

But where there are *several counts* in a declaration, and defendant pleads *one* plea in bar of the *whole* declaration, without distinguishing the counts; plaintiff may neverthe- 2 Mass. T. R. 81.

on, in the *first count*, was atte
and concluded with praying
cluded, &c. as to *all* the coun
cially. 1st. Because the *ref*
and, 2d. Because the replica
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Parsons, Ch. J. If defendar
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Lampleigh v. Braithwaite, Hob. 105.

Where the promise is to a
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verse the consideration alone

1 Esp. Dig. 148.

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Cro. Jac. 483.

So defendant cannot plead
countermanded his promise.

Howe v. Beech, 3 Lev. 244.

As where plaintiff declared
would solicit and conclude a
which he had with J. S. he w

Matters of *law*, that do not go to the *gist* of the action, but to the *discharge* of it, must be *pleaded*; such as accord and satisfaction, the statute of limitations, &c. 1 Esp. Dig. 148.

Accord and *satisfaction* is a good plea in *assumpsit*; but it must be consummated at the time of the plea. Ibid.

For where in assumpsit defendant pleaded an *accord* between him and the plaintiff, to do several matters in bar of the demand, and averred the performance of *part*, and that he tendered the performance of the *remainder*; on demurrer the plea was held to be *ill*; for accord should only be pleaded when *executed*; for then only is it a *satisfaction*. Sheperd v. Lewis, Sir T. Jones, 6. 1 Esp. Dig. 149.

For a bare *accord*, without *satisfaction*, is no plea. Ibid.

Therefore where defendant pleaded, "*that his several creditors, one of whom was the plaintiff, had come to an agreement to accept a composition, in lieu of their respective debts from him, to be paid within a reasonable time*," this was held to be no plea to this action for the *whole* demand; for it was a mere *accord* without *satisfaction*. But per Buller, J. If the defendant had assigned over all his effects to a trustee for his creditors, in order to pay them all, *pro rata*; it had been a good bar. Heathcote v. Crookshanks, 2 T. R. 24.

Payment is a good plea in this action, under this head of satisfaction. It was in this case demurred to, as amounting to the *general issue*; but the demurrer was overruled; for it admits a good cause of action, though discharged by a subsequent transaction. Vanhatton v. Morse, 2 Ld. Raym. 787.

So is payment of a *lesser sum before the time*. But this must always be pleaded; for it is not a performance which destroys the very being of a promise, but a collateral agreement that supplies the place of it. But such evidence may be given in mitigation of damages. Abbot v. Chapman, 2 Lev. 81. 1 Esp. Dig. 149.

And wherever accord and satisfaction is pleaded, it must appear to the court to be a reasonable and good satisfaction, and be accepted by the plaintiff as such; such as better security. So a *bond* may be pleaded in bar of a simple contract debt. 1 Stra. 426. 1 Esp. Dig. 150.

The statute of limitations is also a good plea in bar of this action. By statute it is provided, that actions of *assumpsit* shall be brought within *six* years next after the cause of such actions, and not after. Mass. Stat. Feb. 13, 1787, sect. 1.

1 Esp. Dig. 155.

There are circumstances which may prevent the statute from operating as a bar to the plaintiff's action; such as a revival of the assumpsit, by a new promise, or acknowledgment of the debt, at any time within six years next before the action brought. So also a note attested by one or more witnesses, is not within the statute; provided the action be brought by the original promissee, his executor, or administrator. The statute also makes an exception in favour of infants, femes covert, persons imprisoned, or beyond sea, without any of the United States, and persons *non compos mentis*; who may respectively bring their actions within six years from the time their disability is removed. But this subject will be pursued more in detail, when we treat of the "LIMITATION OF ACTIONS."

Mass. Stat. Feb. 13, 1787, sect. 5.

Ibid. Sect. 4.

1 Esp. Dig. 166.

Another plea in this action is that of *tender*. And wherever the defendant admits that money is due to the plaintiff, it must be pleaded in the form of a tender. This subject will also be more fully noticed under the head of "TENDER, AND BRINGING MONEY INTO COURT."

Darby v. Boucher, Salk. 279.

Infancy is also a good plea in this action; though this may be given in evidence under the general issue of *non assumpsit*.

1 Esp. Dig. 169.

The general rule, in the case of infants, is, that they are liable on no contracts, except for *necessaries*; as meat, drink, education, clothes, &c. But particulars, relative to this subject, are reserved for the title of "INFANCY."

1 Esp. Dig. 175.

A judgment for a defendant, in one personal action, is a good bar to another personal action, for the same cause. But the cause of action must be *specially* stated to be the *same*.

Hitchin v. Campbell, 2 Bl. Rep. 779.
3 Wils. 240.
2 Bl. Rep. 827.
3 Wils. 304.

As where a creditor to a bankrupt had, after the commission of bankruptcy, sued out execution, and the sheriff had seized the goods, for which the assignees had brought *trover*, but had had a verdict *against* them. Having afterwards brought *assumpsit* for the money arising from the sale of the same goods, the plea of the *former recovery in trover*, was held to be ill, for want of the *proper averment* to support the plea, *that the question or cause of action was the same*; though the court held clearly that the assignees, having failed in the action of *trover*, could not recover in

assumpsit, for the price of the same goods. So that if the pleadings had been *proper*, the bar had been a good one. And the test when one action shall be a bar to another is, *when the same evidence is required in both actions*; as was the case in this action.

So a plea in bar of a former recovery may be good, although the plea states no sum as recovered in damages or costs, but has blank spaces where the sums are usually inserted. 1 Mass. T. R. 232.

As where the defendant pleaded in bar a judgment recovered on a note by the testator in his life-time, for the sum of damages and costs; i. e. no sum was stated in the plea as recovered in damages or costs; and the record produced was of a judgment according to the plea, rendered on default. The plaintiffs demurred specially, and assigned for cause, that there was no specification, in the plea, of any sum recovered in the supposed judgment, either in damages or costs; but the court, without hearing any argument, were clearly of opinion that the plea was good. Wells & al. Ex. v. Dench, 1 Mass. T.R. 232.

If the defendant has been sued as *trustee* of the plaintiff, and been *charged* with the debt, *in that capacity*; this matter may be either *specially* pleaded, or given in evidence under the general issue.

The trustee statute enacts, that the goods, effects, and credits of any person, taken by process of law, out of the hands of his trustee, shall forever acquit and discharge such trustee, from and against all suits, damages, and demands whatever, to be commenced or claimed by his principal, his executors or administrators of and for the same. And if any trustee shall be troubled or sued on account of any thing by him done pursuant to the statute, he may plead the general issue, and give the statute in evidence. Mass. Stat. Feb. 28, 1795, act 9, sect. 8.

So also a plea in bar, that the defendant has had judgment against him as *trustee*, in an action upon the trustee statute, is good, although no execution has issued on such judgment; and although it does not appear that the trustee has paid, on the judgment, any part of the sum he had in his hands, as trustee. Perkins v. Parker, 1 Mass. T. R. 117.

1 Esp. Dig. 176. A *release* is also a good plea in this action.

Per Holt, Ch. J. in May v. King, 12 Mod. Rep. 538. And a promise before it is broken, may be released by *parol*,

1 Esp. Dig. 176. but, after it has been broken, it cannot be discharged without *deed*, by any new agreement without satisfaction. But until there is some duty or demand, there is nothing whereon the release can operate.

Drage v. Netter, 1 Ld. Raym. 65. Therefore where, to an action on a *bill of exchange*, the defendant pleaded a release after the bill drawn, but before the *acceptance* by the defendant; the bill being drawn by J S, upon the defendant; it was adjudged bad: For the release was before the defendant was chargeable.

Marshall v. Gibbs, 2 Stra. 1022. Another plea in this action, is that of the *general issue*, which is *non assumpsit*. Though where defendant pleaded *not guilty*, it was held to be good after a verdict; though if plaintiff had demurred, it had been bad.

2 Burr. 1010. Per Lord Mansfield. Under this issue, the defendant may go into equitable defence. He may prove a release without pleading it, and take advantage of every equitable allowance possible.

Dale v. Sollet, 4 Burr. 2133. As in assumpsit for money had and received, defendant may, under the general issue, give in evidence *a retainer* of so much in his hands as is due to him by the plaintiff, without pleading, or giving notice of it as a set-off; for the plaintiff can only recover what in equity and conscience is due, which is what remains due after all fair deductions.

Hatton v. Morse, Salk. 394. So he can give *payment* in evidence under the general issue, or he may plead it; for as there is no debt, there shall be presumed to be no promise.

Mass. Stat. March 16, 1784, act 9, sect. 1. So, under the general issue, he can give in evidence an usurious contract; for such contracts being by statute absolutely void, there can be no assumpsit.

Ibid. sect. 2. So also does our statute allow the defendant, where there is an usurious contract, to make oath to such contract's being usurious, (and it shall be sufficient to discharge the defendant) unless the plaintiff will make oath to the contrary: in which case the defendant's oath will not be admitted.

Mass. Stat. March 4, 1786, act 1, sect. 1. So also are gaming contracts declared void by statute; this matter may therefore be given in evidence under the general issue.

So, in an action against a town, for expenses incurred for the support of a person alleged to be a *pauper*; defendant may, under the general issue, give in evidence, that such supposed pauper was of ability to maintain himself. And where this matter was *specially* pleaded, the plea was held good upon a *general* demurrer; though such special plea would have been bad on a *special* demurrer, assigning for cause, that it amounted to the general issue.

Town of Freeport v. Town of Edgecomb, 1 Mass. T. R. 459.

And in general, whatever *defeats* the promise, is good evidence under the general issue.

2 Stra. 733, Per Holt.

XIX. Of the verdict and damages.

The verdict should follow the issue: For if plaintiff declares, that defendant assumed to do divers things, and the jury find that he assumed to do only a part, plaintiff has failed in his case.

1 Esp. Dig. 178.

As where plaintiff declared that, in consideration of, &c. defendant undertook and assumed to give him thirteen pounds, a field of hemp, and other matters; and the jury find, that defendant only promised to give him *thirteen pounds*; defendant had judgment.

Simms v. Westcott, Cro. Eliz. 147.

So if plaintiff declares on an *absolute* promise, and the jury find a *conditional* one, plaintiff shall not have judgment: For the promise in the first case is entire; and if plaintiff fails in proving part, he fails in the whole. And in the latter case, the promise found, is not that on which the plaintiff grounded his action.

Mustard v. Hopper, Cro. Eliz. 149.

See also 1 T. R. 240.

But where the ground of the action is not upon an *entire* contract, but merely in damages, there the finding of the jury may vary: For it is a rule in this action, that the plaintiff may recover *less* than he goes for, but not *more*.

1 Esp. Dig. 179.

2 Burr. 906.

Therefore, in an action on a policy of insurance, where the plaintiff declared for a total loss, he was allowed to recover for a partial one.

Gardiner v. Croasdale, 2 Burr. 904.

When the jury find a verdict, they then settle the quantum of damages; as to which it may be observed, that, on an account stated, and balance due to the plaintiff, interest should be allowed on the sum, so settled, from the time of its being so liquidated, to the bringing of the action. Where a note is due, it bears interest from that

Blaney v. Hendrick, 3 Wils. 205.

time. Where money is lent, it bears interest from the time it becomes payable. But for money, due for goods sold, no interest is allowed.

XX. Of the costs.

Formerly, if the plaintiff, in any action brought originally at the common pleas, recovered for debt or damage no more than four pounds, the plaintiff was entitled to no more than one quarter part of the amount of the debt or damage, so recovered.

Mass. Stat. March 11, 1784, act 3, sect. 8.

However, by statute of February 13, 1787, sect. 3, it is provided, that the party, in such case, may have full costs, if, in the opinion of the court, the plaintiff had a reasonable expectation of larger damages than *four pounds*:[9]

So, by the same statute, where judgment shall be rendered, upon the report of referees, full costs shall be taxed for the party recovering, notwithstanding the judgment does not exceed *four pounds*; unless a different adjudication, respecting the costs, shall be made from the report itself.

sect. 3.

But now, by a subsequent statute, if the action be brought originally before the common pleas, the plaintiff must recover more than *twenty* dollars damage; otherwise, he will be entitled to no more than one quarter part so much costs as the damage he recovers.

Mass. Stat. March 11, 1808, sect. 2.

[9] This "*reasonable expectation*" refers only to matters of *fact*, and not to matter in *law*; as where a defendant files his account as a set-off, or when, from evidence unexpectedly produced, the plaintiff's judgment is reduced to four pounds. *Toppan* vs. *Atkinson*, 2 *Mass. T. R.* 365.

But, in the case of *Bickford* vs. *Page*, 2 *Mass. T R.* 455, the damages recovered did not exceed four pounds, yet the court allowed full costs; because a different principle had theretofore governed the court in assessing damages, than that by which they were governed in this case; and therefore the plaintiff might reasonably expect a greater sum. However, the action being covenant, in which the title to real estate was brought in question, the plaintiff, on this last ground, was entitled to full costs.

TITLE XVII.

ATTACHMENT.

1st. WHAT property may be attached.

2d. What property is exempted from attachment.

3d. In what manner an attachment may be lost.

4th. How far an officer is justifiable in breaking the doors of a *dwelling-house* to make an attachment.

I. What property may be attached.

Real estate may be attached, but it cannot be taken in execution, when the execution is issued by a justice of the peace. Mass. Stat. Oct. 30, 1784, sect. 3. Vide form of Ex.

So also, all rights in equity of redeeming lands, mortgaged reversions, or the remainders, shall be liable to be taken by *capias*, or attachment upon mesne process, and by execution upon judgment recovered, for the payment of the just debts of the mortgagor or owner. Mass. Stat. March 17, 1784, act 1, sect. 4.

So also, the share or shares, or interest of any person, in any turnpike, bridge, canal, or other incorporated company, may, together with all the rights and privileges appertaining to such shares, be attached on mesne process, and taken on execution. Mass. Stat. March 8, 1805, act 7, sect. 1.

So also, the goods, effects, or credits of a debtor, deposited with some third person, may be attached in the hands of that *third* person. This furnishes an extensive remedy against fraudulent and absconding debtors; and is given by statute, which enacts, that any person or persons, body politic or corporate, entitled to any personal action, (excepting detinue, replevin, actions on the case for slanderous words, or malicious prosecutions, or actions of trespass for assault and battery,) against any person or persons, (other than bodies politic or corporate,) having any goods, effects, or credits, so entrusted or deposited in the hands of others, Mass. Stat. Feb. 28, 1795, act 9, sect. 1.

By and against whom, and in what cases, actions of foreign attachment may be brought.

that the same cannot be attached by the ordinary process of law, may cause not only the goods of the person, against whom such action lies, to be attached in his own hands and possession, but also all his goods, effects, and credits, so entrusted or deposited, to be attached, in whose hands or possession soever they may be found, by an original writ to issue from the court of common pleas.

II. What property is exempted from attachment.

Mass. Stat. March 13, 1806, ad 5, sect. 1.

What articles of furniture, and what domestic animals are exempted from attachment.

By statute it is enacted, that the wearing apparel, beds, bedsteads, bedding, and household utensils of any debtor, necessary for himself, his wife, and children; the tools of any debtor, necessary for his trade or occupation; the bibles, and school-books, which may be in actual use in his or her family; together with one cow, and one swine; shall be altogether exempted from attachment and execution; and no civil officer shall attach, levy upon, or take the same, or any part thereof, either upon mesne process or execution. Provided nevertheless, that the beds and bedding, exempted as aforesaid, shall not exceed one bed, bedstead, and necessary bedding, to two persons; and the household furniture shall not exceed the value of fifty dollars, upon any just appraisement.

Proviso.

Mass. Stat. Nov. 19, 1784, ad 2, sect. 4.

If an execution debtor be committed, and be legally discharged from his confinement, on taking the poor debtor's oath; in such case, the judgment is nevertheless good against the estate of such debtor, and the creditor may either sue the judgment, or take out a new execution against any estate attachable by law; but his body cannot be again taken for the same debt.

Mass. Stat. March 13, 1806, ad 5, sect. 1.

Cooke v. Gibbs, 3 Mass. T. R. 193.

And where an action is brought on the judgment, the writ may command the sheriff to attach the defendant's estate, and to summon him to appear.

Same Case, Per Parsons, Ch. J.

Nor is it necessary to except, from such command, the articles legally freed from attachment. For if it sufficiently appears, that the plaintiff is entitled to a writ of attachment against the defendant's goods or estate, the precept to the sheriff must be construed to extend to such estate only, as is by law liable to attachment on the writ.

Brinley v. Allen, 3 Mass. T. R. 561.

An officer cannot attach the estate of a defendant, on mesne process, after having arrested his body on the same

writ; and if he attach both, and return only the attachment of the estate; in such case, he is liable to an action for a false return: And such action also lies for a third person, who had caused the same estate to be afterwards attached at his suit.

Every citizen enrolled, and providing himself with the arms, ammunition, and accoutrements required by law, shall hold the same exempted from all suits, distresses, executions, or sales for debt, or for payment of taxes.

Mass. Stat. June 22, 1793, act 1, sect. 18.

Things fixed to the freehold cannot be attached, or taken in execution; and therefore for such taking, trespass will lie.

Day v. Bisbitch, Cro. Eliz. 374.

In an action against an executor or administrator, *as such*, though the estate of the *deceased* may be attached,* yet the estate which properly belongs to the executor or administrator, in his *individual capacity*, cannot be; unless upon a *suggestion of waste*, founded on the sheriff's return of *non est inventus*, as to the estate of the testator or intestate; in which case a *scire facias* may issue against the executor or administrator; and upon default of appearance, or not shewing sufficient cause, execution shall be awarded against him of his own proper goods and estate, to the value of such waste, where it can be ascertained; otherwise for the whole sum recovered; and for want of goods or estate, against the body of such executor or administrator.

Mass. Stat. March 4, 1784, sect. 9.

Property belonging to an executor or administrator, in his individual capacity, exempted from attachment in an action against him in his official capacity, except he be guilty of waste.

III. In what manner an attachment may be lost.

There are numerous ways in which an attachment may be lost. Thus,

1st. An attachment may be lost by the death of the defendant, pending the suit; provided the estate of the deceased be represented as insolvent, but not otherwise.

For by statute it is enacted, that when any goods or estate are attached upon any writ or process, which shall be pending, the same shall not be released or discharged, by

Mass. Stat. March 19, 1784, act 3, sect 2.

* An execution against the goods and estate of a deceased person, in the hands of his executor, may be levied on lands, (of which the testator died seized,) in possession of the alienee of a devisee; and this though the executor, being also residuary legatee, has given bond with sureties to the judge of probate, for the payment of the debts and legacies. *Gore* vs. *Brazier*, 3 *Mass. T. R.* 523.

corn & other products of the said raised annually by labor & cultivation is personal estate & is liable to be seized on Exn and may be sold as personal estate being privileged by the Mass. R. Vol. 3 L. p.

An attachment lost, when defendant dies pending the suit, and his estate rendered insolvent; otherwise the attachment remains good.

reason of the death of either party; but be held good to respond the judgment to be given on such suit or process, in the same manner as by law they would have been, if such deceased person had been living. Provided always, that where any estate, attached as aforesaid, shall, by the executor or administrator of the same, be represented as insolvent, and a commission of insolvency shall thereupon issue; in all such cases, attachments, made as aforesaid, shall have no force or efficacy, after the death of the original defendant or defendants in the action.

2d. So also an attachment may be lost, by omitting to take the property in execution, within thirty days after final judgment.

Mass. Stat. Oct. 30, 1784, sect. 11.

An attachment lost, where plaintiff omits to take property in execution within 30 days after judgment.

For by statute it is enacted, that all goods and estate attached upon mesne process, for the security of the debt or damages sued for, shall be held for the space of thirty days after final judgment, to be taken in execution. And if the creditor shall not take them in execution, within thirty days after judgment, the attachment shall be void.

Mass. Stat. Feb. 28, 1807, act 8.

Proviso in favour of Nantucket.

However, by a recent statute, the island of Nantucket is excluded from the above provision. It is enacted, that all attachments of goods and estates, made on the island of Nantucket, to satisfy a judgment obtained on mesne process, shall be held for the space of sixty days after final judgment, to be taken in execution.

3d. An attachment may also be lost by reason of a defective or illegal service. And it is for this cause, that attachments are most frequently lost, or rather that they are not acquired. Thus,

Mass. Stat. March 8, 1792, act 2, sect. 9.

Attachments, made on Sunday, are void.

If an attachment be made on *Sunday*, it is void. By statute it is enacted, that no person shall serve or execute any civil process, from midnight preceding to midnight following the Lord's day; but the service thereof shall be void, and the person serving the same shall be as liable to answer damages to the party aggrieved, as if he had done the same without any such civil process.

If personal property be attached, and be left in the defendant's possession, it is still open to the attachment of another creditor.

If personal property be attached, and the officer leaves it in the defendant's possession, it is still open to the attachment of another creditor, in the same manner as if no previous attachment had been made. But although the firs

attachment is, in such case, lost; yet, if the property be not forthcoming upon the execution, or other property cannot be found to satisfy the execution, the officer who made the attachment is answerable to the plaintiff for the amount of it; for it was through the negligence of the officer that the attachment was lost; and the plaintiff shall not suffer for his negligence.

Officer liable to the creditor in such case.

4th. So also if an appellant, who is also plaintiff in the action, omit to enter his appeal at the *regular* term, but enters it, on petition, at a subsequent term; in such case the attachment on the original writ is discharged.

Mass. Stat. June 18, 1791, act 6, sect. 1.

So also if an appellee, who is also plaintiff in the action, omit to enter his complaint, for affirmation of judgment, at the *regular* term, but enters it, on petition, at a subsequent term, in such case also the attachment, on the original writ, is discharged.

Ibid.

IV. How far an officer is *justifiable* in breaking the doors of a dwelling-house, to make an attachment.

It is not lawful for the sheriff or his officers, to break the *house* of any person to execute a *civil* process against the goods or the person; and if the sheriff or his officers do so, he is a trespasser; for the law will not allow such breach of the peace.

Semayne's Case, 5 Co. 91, 92.

And although the officer does not *himself actually break* the door; yet, if by *fraud* or *force*, he compels those within to open it, upon which he forcibly enters, this is a *constructive* breaking of the house, and he is liable.

Constructive breaking.

Therefore, where bailiffs rapped at a door, and, on its being opened to see who was there, rushed forcibly in with their swords drawn, the entry and arrest were held to be unlawful.

Park v. Evans, Hob. 62.

But this privilege is confined to the person or goods of the *owner of the house*, or such as are brought there, without fraud or covin; and therefore shall not protect the person or goods of any other, which are brought there to prevent a lawful execution; and therefore, in such case, after *denial* and *request*, the sheriff may break doors to do the execution. But, in such case, a demand of the delivery

Semayne's Case, 5 Co. 91.

The law extends its protection only to the goods or person of the owner of the house.

of the goods is necessary; for if he breaks the house, without making such demand, he is a trespasser.

Lee v. Gansel, Cowp. 1.

The officer may break open an inner-door.

So also, if the officer finds the *outer* door open, and enters *peaceably*, he may break open the *inner door* to make an arrest, and, of course, to make an attachment. And this was held so in the present case, where defendant was a *lodger*, whose room, it was contended, was as his dwelling-house.

APPENDIX.

NO. I. (Vid. p. 75.)

AN ACT TO ESTABLISH AN UNIFORM RULE OF NATURALIZATION, AND TO REPEAL THE ACTS HERETOFORE PASSED ON THAT SUBJECT.

[Passed April 14, 1802.]

SECTION 1. *BE it enacted by the senate and house of representatives of the United States of America, in congress assembled,* That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise :— An alien may become a citizen of the United States.

First, That he shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least, before his admission, that it was, bona fide, his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may, at the time, be a citizen or subject. On what conditions.

Secondly, That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Thirdly, That the court, admitting such alien, shall be satisfied that he has resided within the United States five years at least, and within the state or territory, where such court is at the time held, one year at least ; and it shall further appear to their satisfaction, that, during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same : *Provided,* that the oath of the applicant shall, in no case, be allowed to prove his residence.

Fourthly, That in case the alien, applying to be admitted to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application shall be made, which renunciation shall be recorded in the

No. I.

On what conditions an alien may be naturalized.

said court: *Provided*, That no alien, who shall be a native citizen, denizen, or subject of any country, state, or sovereign, with whom the United States shall be at war, at the time of his application, shall be then admitted to be a citizen of the United States: *Provided also*, That any alien, who was residing within the limits, and under the jurisdiction of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen, on due proof made to some one of the courts aforesaid, that he has resided two years, at least, within and under the jurisdiction of the United States, and one year, at least, immediately preceding his application, within the state or territory where such court is at the time held; and on his declaring on oath or affirmation, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever; and particularly, by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject: and moreover, on its appearing to the satisfaction of the court, that, during the said term of two years, he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien, applying for admission to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his, moreover, making in the court an express renunciation of his title or order of nobility, before he shall be entitled to such admission: all of which proceedings, required in this proviso to be performed in the court, shall be recorded by the clerk thereof: and provided also, that any alien, who was residing within the limits, and under the jurisdiction of the United States, at any time between the said twenty-ninth day of January, one thousand seven hundred and ninety-five, and the eighteenth day of June, one thousand seven hundred and ninety-eight, may, within two years after the passing of this act, be admitted to become a citizen, without a compliance with the first condition above specified.

Mode of naturalization prescribed.

SEC. 2. *Provided also, and be it further enacted*, That in addition to the directions aforesaid, all free white persons, being aliens, who may arrive in the United States after the passing of this act, shall, in order to become citizens of the United States, make registry, and obtain certificates, in the following manner, to wit: every person, desirous of being naturalized, shall, if of the age of twenty-one years, make report of himself; or if under the age of twenty-one years, or held in service, shall be reported by his parent, guardian, master, or mistress, to the clerk of the district court of the district, where such alien or aliens shall arrive, or to some other court of record of the United States, or of either of the territorial districts of the same, or of a particular state; and such report shall ascertain the name, birth-place, age, nation, and allegiance of each alien, together with the country whence he or she migrated, and the place of his or her intended settlement: and it shall be the duty of such clerk, on receiving such report, to record the same in his office, and to grant to the person, making such report, and to each individual concerned therein, whenever he shall be required, a certificate under his hand and seal of office of such report and registry; and for receiving and registering each report of an individual or family, he shall receive fifty cents; and for each certificate, granted pursuant to this act, to an individual or family, fifty cents. and such certificate shall be exhibited to the court by every alien who may arrive in the United States, after the passing of this

act, on his application to be naturalized, as evidence of the time of his arrival within the United States.

What courts are to be considered as capable of naturalising aliens.

SEC. 3. *And whereas*, doubts have arisen whether certain courts of record, in some of the states, are included within the description of district or circuit courts: *Be it further enacted*, that every court of record in any individual state, having common law jurisdiction, and a seal and clerk, or prothonotary, shall be considered as a district court within the meaning of this act; and every alien, who may have been naturalized in any such court, shall enjoy, from and after the passing of the act, the same rights and privileges, as if he had been naturalized in a district or circuit court of the United States.

Children of persons, naturalized under certain laws, to be citizens of the United States.

SEC. 4. *And be it further enacted*, That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parent's being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States: *Provided also*, That no person, heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great-Britain, during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed.

Privilege of citizenship not to extend to children of persons who have never resided in the United States: Or to persons proscribed, &c.

Repeal of former acts.

SEC. 5. *And be it further enacted*, That all acts, heretofore passed respecting naturalization, be, and the same are hereby repealed.

AN ACT IN ADDITION TO AN ACT, ENTITULED "AN ACT TO ESTABLISH AN UNIFORM RULE OF NATURALIZATION; AND TO REPEAL THE ACTS HERETOFORE PASSED ON THAT SUBJECT."

[Passed March 26, 1804]

Certain aliens permitted to become citizens of the United States.

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, That any alien, being a free white person, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition, specified in the first section of the act, entituled "An act to establish an uniform rule of naturalization; and to repeal the acts heretofore passed on that subject."

After an alien shall have complied with certain directions, his widow and children made citizens of the United States.

Sec. 2. *And be it further enacted*, That when any alien, who shall have complied with the first condition specified in the first section of the said original act, and who shall have pursued the directions prescribed in the second section of the said act, may die, before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

No. III.

NO. III. (Vid.

Treasurer's complaint aga

TO the justices of the court of gene
the county of to be held at
aforesaid, on the Tuesday of
treasurer of the of , that C I
day of last, was duly and
ified voters of the said to serve
that the said C D was notified to take t
law directs; yet the said C D has, fi
after being notified as aforesaid, neglec
the said oath, whereby he hath forfeite
the use of the poor of the said ;
prays that a warrant of distress may be
for the forfeiture aforesaid, in form and
Dated at , the day of , An

No. IV.

NO. IV. (Vid.

Certificate of the Teacher and Commi

WE, the subscribers, A B, publicl
religious sect or denomination called
precinct, or parish of , and
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society; and that he or she (as the cs
usually, when able, attends with us in
ligious worship.

No. V.

NO. V. (Vid.

AN ACT FOR THE GOVERNMENT AND
IN THE MERCHANTS

upwards, bound from a port in one state, to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement, in writing or in print, with every seaman or mariner on board such ship or vessel, (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner, (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seaman and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given, at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided*, such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act.

Master, failing so to do subject, to penalty.

Sec. 2. *And be it enacted*, That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall in like manner note the time he so neglect to render himself (after the time appointed); every such seaman or mariner shall forfeit for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages, agreed upon, to be deducted out of his wages. And if any such seaman or or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court or before any justice or justices of any state, city, town, or county within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

Mariner, failing to perform the agreement, what penalty subjected to.

Sec. 3. *And be it enacted*, That if the mate or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place

Vessel leaky, or unfit to perform her voyage, what proceedings shall be had for ascertaining the same

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where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or, if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew, who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept, directed to three persons in the neighbourhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of, and to make report to him the said judge or justice, in writing under their hands, or the hands of two of them, whether in any, or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary; and upon such report the said judge or justice shall adjudge and determine, and shall endorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made, or deficiencies supplied, where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear upon the said report and judgment, to have been without foundation, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seaman or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common gaol of the county, there to remain without bail or mainprize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings. *Provided*, that sufficient matter shall be made to appear, upon the return of such habeas corpus, and an examination then to be had, to detain him for the causes herein before assigned.

Master, &c. to pay costs.

Sec. 4. *And be it enacted*, That if any person shall harbour or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town, or county where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they shall continue so to harbour or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mar-

Penalty for harbouring runaway seamen.

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ner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended.

Sec. 5. *And be it enacted*, That if any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages: But if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel; and moreover shall be liable to pay to him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in any court, or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Mariner, absenting himself from duty, penalty on, and how to be proceeded against.

Sec. 6. *And be it enacted*, That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to shew cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty-courts, to answer for the said wages: And if the master shall neglect to appear, or appearing, shall not shew that the wages are paid, or otherwise satisfied, or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty-process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty-courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the

When and at what port entitled to demand his wages:

How to recover them, if withheld.

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contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of ten days next after the delivery of her cargo or ballast.

Mariner, deserting at any port or place, how to be proceeded against and punished.

Sec. 7. *And be it enacted*, That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common gaol of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

Every ship or vessel, outward bound, to be furnished with a medicine cheft:

Sec. 8. *And be it enacted*, That every ship or vessel belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest, so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

Penalty on the master for default.

Ships, &c. bound across the Atlantic, what supply of provisions and water shall be laid in.

Sec. 9. *And be it enacted*, That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and live-stock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread during the voyage, the master or owner of such ship or vessel shall pay to each of the crew, one day's wages beyond the wages agreed on for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.

Penalty for failure.